**CAC References**

**Tab**

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3. *The Public Utilities Board Act*, sections 1, 24, 27 and 77
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5. Board Order 151/13, pages 4, 5, 11, 12, 55-57
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8. *Public Utilities Board v. Manitoba Public Insurance Corp. et al.*, 2011 MBCA 88, pages 21-23
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20. Dictionary.com, definition *NECESSARY*
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# TAB 1

C.C.S.M. c. P215

The Manitoba Public Insurance Corporation Act

Regulations

33(1) Subject to subsection (1.1), for the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make such regulations as are ancillary thereto and not inconsistent therewith; and every regulation shall be deemed to be part of this Act and has the force of law; and, without restricting the generality of the foregoing, the Lieutenant Governor in Council may make regulations

(a) establishing, amending, and revoking such plans of automobile insurance and plans of universal compulsory automobile insurance for the insurance within Manitoba of such losses, damages, injuries, or deaths arising out of the perils and risks attendant upon or relating to the use, operation, or ownership of motor vehicles and trailers as the Lieutenant Governor in Council may designate;

(b) establishing the terms, conditions, and limits of insurance under any plan;

(c) establishing classes and sub-classes of drivers, by regions of the Province of Manitoba, or otherwise, establishing such regions, establishing classes of motor vehicles and trailers, and prescribing the premiums payable by drivers and owners of motor vehicles according to the regions, or otherwise, and according to the classes;

(d) designating those persons who are, or may be, insured under any plan, the benefits or insurance moneys payable to insured persons, and the perils or risks for which insurance may be provided;

(e) prescribing the duration of the period of coverage provided under any certificate;

(f) defining for the purposes of the regulations words not defined in the Act;

(g) prescribing such rights of salvage in favour of the corporation as may be considered necessary for the purposes of any plan;

(h) establishing a driver safety rating system to rate a person based on the input factors recorded in his or her driver record, or on the absence of input factors in the record over time, for the purpose of determining the premium that the person must pay for a driver's certificate;

(h.1) respecting the driver safety rating system established under clause (h), including, but not limited to,

(i) prescribing the facts recorded in a person's driver record that are input factors and negatively affect the person's position on the driver safety rating scale,

(ii) prescribing the amount of the effect for a particular input factor or class of input factors,

(iii) respecting the period that a person must drive without an input factor being attributed to him or her by the registrar before the driver is eligible to have one or more merits added to, or one or more demerits removed from, his or her driver safety rating,

(iv) respecting other circumstances in which a person may be eligible to have merits added to or demerits removed from his or her driver safety rating, and

(v) respecting the circumstances in which the corporation may reassess a person's driver safety rating and assess an additional driver premium that the person must pay;

(h.2) respecting the premiums that drivers must pay for their drivers' certificates depending on their

placement on the driver safety rating scale;

(i) establishing a plan for payment by the corporation to any person sustaining loss from bodily injury or death, or damage to property, arising out of the use or operation of a motor vehicle where

(i) the name of the owner or driver is not known; or

(ii) the name of the driver is not known and the owner is not liable;

the terms, conditions, and limits of liability of the corporation under the plan; and the duties and liabilities of owners and drivers of motor vehicles respecting reimbursement of the corporation for such payments;

(j) establishing and determining, with respect to any plan, the right of any person who would have a cause of action in Manitoba against the owner or driver of an uninsured motor vehicle to apply to the corporation for payment of damages, the terms and conditions and limits of liability of the corporation for payment of the claims for damages determining whether or not payment and the amount thereof is within the discretion of the corporation, and providing for the obtaining of consents to payment of those persons liable for the losses, damages, injuries, or deaths, and the execution under seal or otherwise of agreements by those persons liable for the repayment to the corporation of amounts paid to claimants;

(k) providing, with respect to any plan, for settlement and payment of a claim or judgment or unsatisfied portion of a judgment, for damages on account of injury to, or the death of, any person or loss of, or damage to, property occasioned in Manitoba by an uninsured motor vehicle owned or operated by a person within Manitoba, the terms and conditions governing the payment, and the maximum amount of money payable respecting any person, accident, or occurrence;

(l) determining the residence of persons for purposes of this Act, the regulations, and any plan, and determining the rights of non-residents to receive benefits or payments of any kind whatsoever under any plan, or exempting non-residents, as described in the regulations, from the provisions of this Act or the regulations;

(m) authorizing any additional services and expenditures by the corporation on behalf of a person insured under an owner's certificate and providing that the corporation may, in the name and on behalf of any person insured by an owner's certificate, defend at its cost any civil action brought against such person by anyone respecting a loss, damage, injury, or death for which that person may be liable, and designating the terms and conditions governing the provision of additional services and the making of additional expenditures;

(n) providing for and prescribing the conditions governing the refund or rebate of the whole or part of a premium paid to the corporation under this Act and any plan;

(o) respecting any matter considered necessary or deemed advisable by the Lieutenant Governor in Council for the effective carrying out of the intent and purpose of this Act and the regulations and any insurance plan established under this Act.

Review by P.U.B

33(1.1) No regulation relating to premiums charged by the corporation for compulsory driver and vehicle insurance shall be passed pursuant to subsection (1) unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board pursuant to Part IV of *The Crown Corporations Public Review and Accountability Act*.

Condition precedent to obtaining benefits

33(2) Subject to section 25, the observance of any term or condition established under

subsection (1) shall be a condition precedent to the obtaining of benefits, insurance moneys, or indemnification provided under any plan of insurance.

Exclusion of non-residents and motor vehicles

33(3) The Lieutenant Governor in Council may, by regulation, exclude or exempt any non-residents or class of non-residents and any motor vehicle or trailer or class thereof from the operation of this Act or the regulations, or any provision of the Act or the regulations, or any plan or part of a plan upon such terms and conditions as he may prescribe.

Application of regulations under clause (1)(h), (h.1) or (h.2)

33(4) A regulation made under clause (1)(h), (h.1) or (h.2) does not apply in relation to a conviction for an offence under subsection 88(7) or (9) (red light offences), subsection 95(1) (speeding offences) or clause 134(1)(b) or (c) (railway crossing offences) of *The Highway Traffic Act* that is based on evidence obtained through the use of an image capturing enforcement system as defined in that Act.

S.M. 1988-89, c. 23, s. 37; S.M. 2002, c. 1, s. 21; S.M. 2008, c. 36, s. 50.

# TAB 2

C.C.S.M. c. C336

The Crown Corporations Public Review and Accountability Act

PART IV

PUBLIC UTILITIES BOARD REVIEW OF RATES

Hydro and MPIC rates review

26(1) Notwithstanding any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under *The Public Utilities Board Act* and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.

Definition, "rates for services"

26(2) For the purposes of this Part, **"rates for services"** means

(a) [repealed] S.M. 1995, c. 33, s. 5;

(b) in the case of Manitoba Hydro, prices charged by that corporation with respect to the provision of power as defined in *The Manitoba Hydro Act*;

(c) in the case of the Manitoba Public Insurance Corporation, rate bases and premiums charged with respect to compulsory driver and vehicle insurance provided by that corporation.

Application of Public Utilities Board Act

26(3) *The Public Utilities Board Act* applies with any necessary changes to a review pursuant to this Part of rates for services.

Factors to be considered, hearings

26(4) In reaching a decision pursuant to this Part, The Public Utilities Board may

(a) take into consideration

(i) the amount required to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs;

(vii) any other payments that are required to be made out of the revenue of the corporation,

(viii) any compelling policy considerations that the board considers relevant to the matter,

(ix) any other factors that the board considers relevant to the matter; and

(b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the board, have an interest in the matter.

MPIC

26(5) In the case of a review pursuant to this Part of rates for services of the Manitoba Public Insurance Corporation, The Public Utilities Board may take into consideration, in addition to factors described in subsection (4), all elements of insurance coverage affecting insurance rates.

S.M. 1995, c. 33, s. 5.

Multi-year approvals

27(1) A corporation may submit for the approval of The Public Utilities Board pursuant to this Part proposals regarding rates for services relating to a period of not more than three years and the board shall identify in its order the change approved, if any, with respect to each year.

Increases not cumulative

27(2) No corporation shall increase rates for services by an amount in any year that exceeds the amount approved for that year by The Public Utilities Board or introduce new rates for services in any year other than new rates for services approved for introduction in that year by The Public Utilities Board.

Changed circumstances

27(3) Where The Public Utilities Board is satisfied that the circumstances of a corporation have changed substantially, The Public Utilities Board may, of its own motion or on the application of the corporation or an interested person, review an order made pursuant to this section and modify the order in any manner that The Public Utilities Board considers reasonable and justified in the circumstances.

Compensation or refunds

28 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.

# TAB 3

C.C.S.M. c. P280

The Public Utilities Board Act

Definitions

1 In this Act,

**"board"** means The Public Utilities Board continued under this Act; (« Régie »)

**"chairman"** means the chairman of the board designated as such under section 5; (« président »)

**"company"** includes every association, company, corporation or syndicate of persons, whether incorporated or unincorporated; (« compagnie »)

**"member"** means a member of the board; (« membre »)

**"minister"** means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act; (« ministre »)

**"municipality"** means a city, town, village, rural municipality or local government district; and **"municipal"** has a corresponding meaning; (« municipalité »)

**"owner of a public utility"** or **"owner"** includes

(a) every corporation, including municipal corporations, and every person, firm, or association of persons the business or operations whereof are subject to the authority of the Legislature; and

(b) their lessees, trustees, liquidators or receivers appointed by any court;

that own, operate, manage or control any public utility; (« propriétaire d'un service public » ou « propriétaire »)

**"public utility"** means, subject to subsections 2(2) and 2(3), any system, works, plant, pipe line, equipment or service

(a) for the transmission of telegraph or telephone messages; or

(b) for the conveyance of persons or goods over a railway, street railway, or tramway, or by motor bus or truck; or

(c) for the production, transmission, delivery, or furnishing of gas, whether natural or manufactured, oil or other fluid petroleum products, water, heat, light, or power;

either directly or indirectly, to or for the public, and includes all such carried on by or for the owner or a municipality or the Government of Manitoba, and also includes any system, works, plant, pipe line, equipment, or service, declared to be a public utility under clause 2(4)(a), a pipeline declared to be a public utility under clause 2(4)(b), and a system of sewage collection or disposal declared to be a public utility under subsection 2(6). (« service public »)

S.M. 1988-89, c. 11, s. 19; S.M. 1992, c. 58, s. 28; S.M. 1993, c. 4, s. 235.

PROCEDURE

Procedure governed by rules

24(1) All hearings and investigations conducted by the board shall be governed by rules adopted by

the board.

Rules of evidence not binding on board

24(2) The board is not bound by the technical rules of legal evidence.

Rules of practice, their publication

24(3) The board may make rules of practice, not inconsistent with this Act, regulating its procedure and the times of its sittings, but the rules do not come into force until they are published on the board's website.

Board to have powers of Court of Queen's Bench in certain matters

24(4) The board, except as herein otherwise provided, as respects the attendance and examination of witnesses, the amendment of proceedings, the production and inspection of documents, the enforcement of its orders, the payment of costs, and all other matters necessary or proper for the due exercise of its powers, or otherwise for carrying any of its powers into effect, has all such powers, rights, and privileges as are vested in the Court of Queen's Bench or a judge thereof.

Witnesses

24(5) The procedure relating to the attendance of witnesses before the board is that from time to time in force in the Court of Queen's Bench; but a summons to a witness may be signed by a member or secretary of the board.

Evidence by affidavit or report

24(6) The board may, in its discretion, accept and act upon evidence by affidavit or written affirmation or by the report of a member or of any officer or technical adviser appointed hereunder or obtained in such other manner as it may decide.

Commissions to take evidence out of Manitoba

24(7) The board may issue commissions to take evidence outside of Manitoba, and make all proper orders for the purpose and for the return and use of the evidence so obtained.

S.M. 2013, c. 39, Sch. A, s. 82.

Initiation of inquiries

27(1) The board may of its own motion, and shall upon the request of the Legislature or the Lieutenant Governor in Council, inquire into, hear, and determine any matter or thing within its jurisdiction.

Power to inspect, examine witnesses, documents, etc.

27(2) The board, or any person authorized by the board to make inquiry or report, may, where it appears expedient,

(a) enter upon and inspect any place, building, works or other property;

(b) require the attendance of all such persons as it or he thinks fit to summon and examine and take the testimony of the persons;

(c) require the production of all books, plans, specifications, drawings and documents;

(d) administer oaths, affirmations, or declarations, and summon witnesses, enforce their attendance, and compel them to give evidence and produce the books, plans, specifications, drawings, and

documents, which it or he may require them to produce.

Authority of officers of the board to administer oaths, etc.

27(3) The board may authorize the secretary of the board, or any person acting as secretary of the board, to administer oaths, affirmations, or declarations, at any hearing or investigation conducted by or for the board.

Orders as to utilities

77 The board may, by order in writing after notice to, and hearing of, the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls, charges, or schedules thereof, as well as commutation, mileage, and other special rates that shall be imposed, observed, and followed thereafter, by any owner of a public utility wherever the board determines that any existing individual rate, joint rate, roll, charge or schedule thereof or commutation, mileage, or other special rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential;

(b) fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed thereafter by any such owner;

(c) direct any railway, street railway, or traction company, to establish and maintain at any junction or point of connection or intersection with any other line of the road, or with any line of any other railway, street railway, or traction company, such just and reasonable connections as may be necessary to promote the convenience of shippers of property, or of passengers, and in like manner may direct any railway, street railway, or traction company engaged in carrying merchandise to construct, maintain, and operate, upon reasonable terms a switch connection with any private side-track that may be constructed by any private shipper to connect with the railway or street railway where, in the judgment of the board, the connection is reasonable and practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance thereof.

# TAB 4

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| **MANITOBA** | **Board Order 5/12** |
| **THE PUBLIC UTILITIES BOARD ACT** | |
| **THE MANITOBA HYDRO ACT** | |
| **THE CROWN CORPORATIONS PUBLIC REVIEW AND ACCOUNTABILITY ACT** | **January 17, 2012** |

Before: Graham Lane CA, Chairman
Robert Mayer Q.C., Vice-Chair

# A FINAL ORDER WITH RESPECT TO MANITOBA HYDRO'S APPLICATION FOR INCREASED 2010/11 AND 2011/12 RATES AND OTHER RELATED MATTERS

0.9% average rate increase effective August 1, 2011. Rather, and based on the totality of the evidence before the Board, including MH Senior Vice President Mr. Warden's testimony that MH is now in its best financial position in the Utility's history, the Board finds that rate increases aligned to the forecast rates of inflation for 2010/11 and 2011/12 are just and reasonable and in the public interest. The Board will therefore approve, on a final basis, a 1.9% average rate increase effective April 1, 2010 and a further 2.0% average rate increase effective April 1, 2011.

The Board does not accept MH's contention that the rates proposed by MH represent a proper balance between customer sensitivity and fiscal responsibility. MH states that it is important that MH maintain an adequate level of retained earnings and that rates be raised gradually even during periods of exceptional water-flows. MH's application also seeks a higher level of retained earnings to provide funding for capital investments and reduce the need for borrowing, which MH states will in turn reduce the financing costs that ultimately must be recovered from ratepayers.

In the Board's opinion, MH's view of fiscal responsibility is skewed by blind adherence to a future major capital plan that has not been fully tested before an independent tribunal considering the "Needs For And Alternatives To" such a major capital expenditure plan (NFAAT). Such an NFAAT should include all facets of MH's capital expenditure plans, including the export contracts MH has entered into or plans to enter into to allow for the advancement of its capital expenditure plans.

The Board was reminded by CAC/MSOS to go back to first principles regarding its rate-setting jurisdiction with respect to MH. CAC/MSOS submitted that the Board's jurisdiction to fix just and reasonable rates carries with it the need to meet the general public interest made up of (1) the interests of ratepayers and (2) the financial health of the utility.

CAC/MSOS submitted that the final rate order should address both short-term test year revenue requirements and the long-term issues facing MH that are of concern to the

PUB, in particular respecting the "decade of investment." CAC/MSOS further submitted that rate-setting at this time must also take into account the ongoing economic uncertainty and financial stresses existing in Manitoba on all consumers, including individuals, businesses and large industry.

The Board's role, according to CAC/MSOS, must involve ensuring that MH's forecasts are reasonably reliable, ensuring that actual and projected costs incurred are necessary and prudent, assessing the reasonable revenue needs of the Corporation in the context of the overall general health of MH, determining an appropriate allocation of costs between classes, and setting just and reasonable rates in accordance with statutory objectives.

The Board endorses these principles and the objectives as set out above that must inform it in the present circumstances when fixing rates for the test years in question. As set out in this Order, the Board is not satisfied that it has sufficient proof from MH, upon consideration of all of the evidence, to support a final approval of rate increases as sought by MH. In this GRA proceeding, MH has failed to substantiate the reasonableness of its capital plans and the expected revenues to support such a capital plan. As such, the Board cannot, and will not, endorse MH's rate increase requests as applied for. However, the Board has determined that MH must receive inflationary increases for the test years to avoid erosion of its capital structure in the test years.

While MH has not made its case for the higher rate increases it requested, its financial position, arising from its Operating Results for the years ending March 31, 2010, 2011, and 2012 is significantly better than when MH filed its GRA in both MH's own assessment and the assessment of the Interveners. For the fiscal year ending March 31, 2010, MH was forecasting $121 million of Net Income. Actual Net Income was $43 million greater, at $164 million. For the fiscal year ending March 31, 2011, MH was forecasting $78 million of Net Income. Actual net income was $65 million greater, at $143 million. Finally, for the fiscal year ending March 31, 2012, MH was forecasting

# TAB 5

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| MANITOBA | ) | |
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| *THE PUBLIC UTILITIES BOARD ACT* | ) | **Order 151/13** |
| | ) | |
| *THE MANITOBA PUBLIC INSURANCE ACT* | ) | |
| | ) | **December 16, 2013** |
| *THE CROWN CORPORATIONS PUBLIC REVIEW AND ACCOUNTABILITY ACT* | ) | |

Before: Régis Gosselin, B ès Arts, MBA, CGA, Chair
The Hon. Anita Neville, P.C., BA Hons., Member
Karen Botting, BA, B.Ed, M.Ed, Member

**MANITOBA PUBLIC INSURANCE CORPORATION (MPI):
COMPULSORY 2014/2015 DRIVER AND VEHICLE INSURANCE PREMIUMS
AND OTHER MATTERS**

## EXECUTIVE SUMMARY

The Public Utilities Board (Board or PUB) hereby orders an overall 0.9% rate increase in compulsory Motor Vehicle Premiums for the 2014/15 insurance year, effective March 1, 2014 for all major classes combined. The Board is substituting the 0.9% rate increase for the 1.8% rate increase applied for by Manitoba Public Insurance (MPI or the Corporation). The Board approves MPI's request that there be no change in Permit and Certificate rates, Vehicle Premium Discounts and Driver License Premiums, Service and Transaction Fees, Fleet Rebates or Surcharges, or the discount on approved after-market and manufacturer/dealer installed anti-theft devices. The Board also approves the rates applied for by the Corporation for the Collector Vehicle insurance use.

The Board continues to have significant concerns about the Corporation's operating expenses, and finds that it must control its expenses. The Board also has concerns with respect to the Corporation's staffing levels. The Board requires that the Corporation review its efficiencies on a go-forward basis, take steps to rein in its operating expenses and file with the Board staffing and cost control results at the next GRA.

The Board requires that the Corporation review its efficiencies and directs MPI to file at next year's GRA a five-year IT strategic plan, including a cost-benefit analysis, justifying its current and future IT expenditures.

The Board orders that MPI file, at the next GRA, a benchmarking framework, along with benchmarking indicators to which the Corporation intends to be held accountable.

The Board directs MPI to have the composition of its investment portfolio reviewed, with a view to determining whether the current asset mix should continue, or should be revised.

The Board finds that there should be more discussion and analysis with respect to the Corporation's proposed interest rate forecasting methodology, to be accomplished at a Technical Conference to take place on or before February 28, 2014, immediately following the DCAT Technical Conference referenced below.

The Board concludes that it is premature to adopt the DCAT approach for the purposes of setting the RSR target, and orders that the Technical Conference continue, on terms as reflected in this Order. For 2014/15, and pending the Board's determination of the RSR target, the RSR target range will continue to be calculated on the basis of the Kopstein approach.

The Board directs MPI to report on the ways in which it has made its Claims Incurred and Ratemaking methodology more transparent, and also directs that it report on options for developing its Claims Incurred and Ratemaking forecasts on a basis other than the fiscal year basis, with an accompanying analysis of pros and cons of such an approach. The Board orders that MPI examine its claim liabilities regarding potential ongoing conservatism within its forecasting, and directs MPI to file the valuation treatment of the results of the early 2013/14 case reserve review at next year's GRA.

The Board also directs MPI to file next year's GRA in accordance with accepted actuarial practice in Canada, as defined by the Canadian Institute of Actuaries, including the Standards of Practice, and that MPI also provide to the Board rate indications pursuant to its current methodology for review. In addition, the Board is to be advised of the practices for compulsory coverage in each of Saskatchewan and British Columbia.

The Board orders that MPI need not file the Exponential and Linear forecasts going forward, and Board Order 174/92 is hereby varied accordingly.

The Board finds that MPI has not fully established that the current portfolio of Road Safety expenditures is prudently and reasonably optimized to maximize value to ratepayers or to minimize economic and social costs of collisions. The Board orders that MPI provide certain specific Road Safety information and analyses at next year's GRA hearing.

This Order reflects the Board's findings on matters which arose over the course of the proceeding through oral testimony and documentary evidence. Public access to the full transcripts of the hearing, including cross-examination, presentations and closing statements, are available on the Board's website (www.pub.gov.mb.ca).

Documentary evidence filed on the record of the hearing may be viewed at the Board's offices. Interested parties may also review MPI's Annual Report and quarterly financial statements, which may be found on MPI's website (www.mpi.mb.ca), and/or previous Board Orders, which may be accessed on the Board's website (www.pub.gov.mb.ca).

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**CMMG**

CMMG stated that motorcyclists have been the victims of excessive rate hikes through the 1990s and the first decade of this millennium, amounting to 227% over the course of a decade. CMMG stated that MPI's current methodology relative to loss ratios is not accurate, and as a result MPI is almost always collecting too much premium, over and above the "padding" that the Corporation does on case reserves, development factors, as well as PFADs for interest rates, PFADs for collection of re-insurance recoverables and a number of other methods.

CMMG stated that the Board should look at MPI's rate indications with skepticism, and should look at the applied for reduction in motorcycle rates as not going far enough based on the actual loss ratios. CMMG stated that an appropriate reduction of motorcycle rates would be approximately 10%.

**CAA**

CAA's concern is to ensure that the rates set for all Manitoba drivers are fair and reasonable. CAA does not support the rate increase applied for by the Corporation but stated that it is open-minded about a small increase if it were to mean a greater focus could be put towards Road Safety efficiencies and initiatives. CAA also stated its belief that the retained earnings in the RSR are still at unnecessarily high levels.

### *2.7 Board Findings*

The Board hereby varies the Corporation's application for an overall 1.8% rate increase, and orders a 0.9% overall rate increase in compulsory Motor Vehicle Premiums for the 2014/15 insurance year, effective March 1, 2014. The Board approves MPI's request that there be no change in Permit and Certificate rates, Vehicle Premium Discounts and Driver License Premiums, Service and Transaction Fees, Fleet Rebates or Surcharges, or the discount on approved after-market and manufacturer/dealer installed anti-theft devices. The Board is satisfied that an overall 0.9% rate increase for Basic is reflective of the revenue requirement for Basic for 2014/15.

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The Board's decision to increase rates by 0.9% is driven by:

- The Board's concern about MPI's new interest rate forecasting methodology (discussed in section 4.4 below) which utilized, in part, an in-house adjustment for estimating rates when MPI, by its own admission, does not have any particular expertise in interest rate forecasting;

- Recent changes in interest rates, not reflected in the GRA filing, that impact favourably on current financial results;

- The continuing increase in MPI's operating expenses, including those for salaries and benefits, that are well beyond the rate of inflation; and

- The level of overall corporate reserves, including AOCI, that are available to MPI and which support its financial condition.

The Board notes that the rates individuals pay will be determined based on their driving record, the kind of vehicle (make and model and year) that they drive, what the vehicle is used for and where they live. An individual's premiums will be impacted based on the actual claims experience associated with the rating factors. As a result, some individuals will experience increases in insurance rates, and others will experience decreases. The Board notes that the vast majority of those who will see an increase will be charged less than $50 annually.

The Board does not approve CMMG's request that rates for the motorcycle class be reduced by 10% instead of 6% as applied for by MPI. No evidence was provided to suggest that the treatment accorded to the motorcycle class in the derivation of the actuarial indications was either unjust or unfair.

Pursuant to this Order, however, MPI shall maintain the experience based applied for rate decreases for the motorcycle, commercial and off-road vehicle classes, with the balance of the overall approved rate change to be applied across the other Major Classes. This will mitigate the impact on Major Classes which are experiencing a rate increase.

The Board approves the rates applied for by the Corporation for the Collector Vehicle insurance use.

## 11 IT IS THEREFORE ORDERED THAT:

11.1 There shall be an overall 0.9% rate increase in compulsory Motor Vehicle Premiums for 2014/15 insurance year, effective March 1, 2014 for all major classes combined, which rate increase BE AND HEREBY IS APPROVED. MPI shall maintain the applied for experience based rate decreases for the motorcycle, commercial and off-road vehicle classes, with the balance of the overall approved rate change to be applied across the other major classes.

11.2 MPI's requests that there be no change in Permit and Certificate rates, Vehicle Premium Discounts and Driver License Premiums, Service and Transaction Fees, Fleet Rebates or Surcharges, or the discount on approved after-market and manufacturer/dealer installed anti-theft devices BE AND HEREBY ARE APPROVED.

11.3 The rates applied for by the Corporation for the Collector Vehicle insurance use BE AND HEREBY ARE APPROVED.

11.4 MPI shall examine its claim liabilities regarding ongoing conservatism within its forecasting, and file the valuation treatment of the results of the early 2013/14 case reserve review at next year's GRA.

11.5 The Board orders that MPI file with the Board staffing and cost control results at the next GRA.

11.6 MPI shall review its efficiencies and file at next year's GRA a five-year IT strategic plan, including a cost-benefit analysis, justifying its current and future IT expenditures.

11.7 MPI shall file, at the next GRA, a benchmarking framework, along with benchmarking indicators to which the Corporation intends to be held accountable.

11.8 MPI shall file, at the next GRA, details of what steps it has taken or intends to take to improve or enhance the services and products being offered to Basic ratepayers.

23

11.9 MPI shall have the composition of its investment portfolio reviewed by an external expert consultant, with a view to determining whether the current asset mix should continue, or should be revised.

11.10 There shall be more discussion and analysis with respect to the Corporation's proposed interest rate forecasting methodology, to be accomplished at a Technical Conference to be conducted by MPI on or before February 28, 2014.

11.11 MPI shall submit a discussion paper of the duration matching of its claims liabilities and investments as part of the next GRA.

11.12 The DCAT Technical Conference shall continue, on terms, and pending the Board's determination of the RSR target, the RSR target range will continue to be calculated on the basis of the Kopstein approach.

11.13 MPI will file with the Board a status update of upcoming accounting changes regarding IFRS and any elections that it may wish to make, as well as options being considered.

11.14 MPI advise the Board at the next GRA as to the practices regarding compliance with accepted actuarial standards of practice for compulsory coverage in each of Saskatchewan and British Columbia.

11.15 MPI report, at the next GRA, the ways in which it has made its Claims Incurred and Ratemaking methodology more transparent.

11.16 MPI provide, at the next GRA, options for developing its Claims Incurred and Ratemaking forecasts on a basis other than the fiscal year basis, with an accompanying analysis of pros and cons of such an approach.

11.17 MPI file next year's GRA to include rate indications determined in accordance with accepted actuarial practice in Canada, as defined by the Canadian Institute of Actuaries, including applicable Standards of Practice, and that MPI also provide to the Board rate indications pursuant to its current methodology for review.

24

11.18 MPI need not file the Exponential and Linear forecasts going forward, and Board Order 174/92 is hereby varied accordingly.

11.19 MPI shall:

(a) Produce for the next GRA an updated map of collisions and fatalities related to pedestrian/motor vehicle accidents in Winnipeg and in rural Manitoba and report on any patterns;

(b) Produce for the next GRA an updated map of collisions and fatalities related to cyclist/motor vehicle accidents in Winnipeg and in rural Manitoba and report on any patterns;

(c) Produce for the next GRA an updated map of collisions and fatalities related to motorcyclist/motor vehicle accidents in Winnipeg and in rural Manitoba & report on any patterns;

(d) Conduct a summative evaluation/benchmarking analysis of its current High School Driver Education program, focusing on whether there is a difference in outcomes for drivers who have completed the program versus drivers who have not;

(e) Provide at the next GRA the results of the analysis in (d) above together with an update regarding the Corporation's plans for changes to the High School Driver Education program;

(f) Provide at the next GRA an independent review of the current Road Safety portfolio with a view to optimizing it (and setting goals for outcomes) and minimizing the economic and social costs of collisions; and

(g) Provide at the next GRA an independent review of the optimal size of a Road Safety budget portfolio for the Corporation with a view to minimizing the economic and social costs of collisions.

# TAB 6

**M A N I T O B A**

Order No. 157/12

**THE PUBLIC UTILITIES BOARD ACT**

**THE MANITOBA PUBLIC INSURANCE ACT**

**THE CROWN CORPORATIONS PUBLIC REVIEW AND ACCOUNTABILITY ACT**

December 3, 2012

Before: Régis Gosselin, B.A., C.G.A., M.B.A., Chair
Karen Botting, B.A., B.Ed., M.Ed., Member
Anita Neville, B.A. Hons., Member

**MANITOBA PUBLIC INSURANCE: COMPULSORY 2013/14 DRIVER AND VEHICLE INSURANCE PREMIUMS AND OTHER MATTERS**

## EXECUTIVE SUMMARY

The Public Utilities Board (Board or PUB) approves the application of Manitoba Public Insurance Corporation (MPI or the Corporation) for no overall rate level change in compulsory Motor Vehicle Premiums for the 2013/14 insurance year, effective March 1, 2013. The Board also approves MPI's request that there be no change in Vehicle Premium Discounts, Fleet Rebates or Surcharges, Service and Transaction Fees, Permit and Certificate rates or the discount provided to customers with approved, installed anti-theft devices.

The Board approves MPI's requested changes to the Driver's License Premiums on the Driver Safety Rating (DSR) scale, at demerit levels -1 to -20, to a maximum of $2,500.

With respect to operating and claims expenses, the Board orders that the Corporation develop productivity factors to enable the assessment of the cost containment measures.

The Board also approves for rate making purposes the adoption of the new Cost Allocation Methodology as proposed by MPI, including the use of Net Claims Incurred as an allocator and the use of four year rolling averages.

The Board believes that the Dynamic Capital Adequacy Testing (DCAT) methodology is an improved approach for determining the target for the Basic Rate Stabilization Reserve (RSR) over the current methodology, however, further analysis and discussion is needed, particularly in relation to the adverse scenarios used in the DCAT and the methodology construct, before such an approach should be utilized for rate-setting purposes. The Board orders MPI to hold a technical conference in early 2013 to discuss, as between the parties to the GRA, the adverse scenarios and methodology construct being utilized currently by the Corporation within the DCAT, with a view to refining the adverse scenarios and gaining a better understanding of the DCAT modeling process. For 2013/14 the RSR target range will continue to be calculated on the basis of the Percentage of Premium approach, though the Board is not ordering any premium rebate to the extent that the RSR balance exceeds the upper limit of the Board's range as at February 28, 2012.

The Board orders that a Road Safety Research Technical Conference take place to discuss Road Safety matters, involving interveners and community partners, to be held on or before

# TAB 7

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# IN THE COURT OF APPEAL OF MANITOBA

| | |
|---|---|
| ***Docket: AI04-30-05963*** | |
| ***B E T W E E N:*** | |
| ***THE CONSUMERS' ASSOCIATION OF CANADA (MANITOBA) INC. AND THE MANITOBA SOCIETY OF SENIORS INC. (CAC/MSOS)*** | ***J. B. Williams*** *for the Applicants CAC/MSOS* |
| | ***T. D. McCaffrey*** *for the Applicant MIPUG* |
| *(Intervenors) Applicants* | |
| *- and -* | ***P. J. Ramage*** *for the Respondents* |
| ***THE MANITOBA HYDRO ELECTRIC BOARD (MANITOBA HYDRO)*** | ***R. F. Peters*** *and* ***A. L. Southall*** *for the Public Utilities Board* |
| *(Applicant) Respondent* | |
| *- and -* | *Chambers motions heard:* ***February 23, 2005*** |
| ***Docket: AI04-30-05969*** | *Decision pronounced:* ***May 5, 2005*** |
| ***B E T W E E N:*** | |
| ***MANITOBA INDUSTRIAL POWER USERS GROUP (MIPUG)*** | |
| *(Intervenor) Applicant* | |
| *- and -* | |
| ***MANITOBA HYDRO*** | |
| *(Applicant) Respondent* | |

**MONNIN J.A.**

1 In both of these actions, the applicants, The Consumers' Association of Canada (Manitoba) Inc. and The Manitoba Society of Seniors Inc.

well be that the PUB could not, or would not, review the specific financial tools that the applicants argue it should have, but that is insufficient in my mind to justify a finding that, as a whole, the PUB did not fix rates that were just and reasonable.

63 The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer groups with those of the utility. The PUB's decision to build retained earnings more rapidly than proposed in order to better protect the utility and consumers from the financial impact of future drought, clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the *Accountability Act.*

64 The role of the PUB under the *Accountability Act* is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understood its role in this regard.

65 The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. These issues were addressed in the PUB's decision.

66 All in all, the PUB addressed the right question, the reasonableness of approved rates. It did not rely on irrelevant evidence or fail to consider relevant evidence. The PUB was alive to the issues and alive to the implications of its decision. It did not apply inappropriate tests or apply appropriate tests or factors incorrectly. It did not make its decision in an arbitrary manner.

67 The setting of rates, and the elements that are to be considered in doing so, require a specialized knowledge and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at. This is not such a case.

68 When all of the arguments of the applicants are considered in light of the evidence the PUB heard and the decision it eventually made, I have not been convinced that what the applicants are complaining about is anything but the methodology the PUB utilized to arrive at that decision. The PUB then went on to justify that decision in the light of the interests of both the public and Hydro.

69 On whatever standard of review I might consider to be the applicable one, the applicants have not convinced me that leave to appeal should be granted. There are no questions of pure law to be decided. At best, from the applicants' perspective, their applications are grounded on questions of mixed fact and law and those issues are not such that they present a matter of importance that ought to engage the court.

70 I therefore deny the applications for leave to appeal.

_____ J.A.

# TAB 8

Citation: Public Utilities Board v. Manitoba Public Insurance Corp. et al., 2011 MBCA 88
Date: 20111122
Docket: AI 10-30-07364

Citation: Public Utilities Board v. Manitoba Public Insurance Corp. et al., 2011 MBCA 88
Date: 20111122
Docket: AI 10-30-07364



# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Chief Justice Richard J. Scott
Madam Justice Holly C. Beard
Mr. Justice Alan D. MacInnes

***BETWEEN:***

| | | |
|---|---|---|
| ***THE PUBLIC UTILITIES BOARD*** | ) | ***W. S. Saranchuk, Q.C.*** *and* |
| | ) | ***C. A. Everard*** |
| *Applicant* | ) | *for the Applicant* |
| | ) | |
| *- and -* | ) | |
| | ) | ***J. F. Rook, Q.C.,*** |
| ***MANITOBA PUBLIC INSURANCE*** | ) | ***R. K. Agarwal*** *and* |
| ***CORPORATION*** | ) | ***K. L. Kalinowsky*** |
| | ) | *for the Respondent* |
| *Respondent* | ) | |
| | ) | |

with information regarding the non-basic lines of business when it was relevant to a specific issue being decided by the PUB. For example, in the years 2005 and 2006, the MPIC allocated money from the non-basic lines of business to the rate stabilization reserve for basic insurance and, to support that decision, it provided the PUB with financial projections and other information for the non-basic lines of business to confirm that the decision was financially solid. It also provided financial information regarding the non-basic lines of business to the PUB to support the new allocation methodologies developed by Deloitte and submitted to the PUB for its approval.



*Conclusion*

45 The question stated by the PUB in this case does not relate to specific documents or information in the context of a specific rate application, but rather asks this court to declare that it, effectively, has *carte blanche* to obtain any information from the MPIC related to the non-basic lines of business that it decides it needs. For the reasons set out above, the case before us raises serious questions as to the need for the PUB to have unfettered access to documents and information that, on the face, appear to be irrelevant to its limited mandate.

46 The description of the documents and information is so wide and so general that it is impossible to determine exactly what types of documents and information could potentially be included. It would be incorrect to answer the question on the stated case in the negative because there are clearly occasions when information and/or documents related exclusively to

the non-basic lines of business should be disclosed, as has occurred in the past. It would also be incorrect to answer the question in the positive, because it would be engaging in speculation on my part to attempt to foresee what information and/or documents might be requested in the future for what purpose and what this court might find the jurisdiction to be.

47 On the issue of the appropriate procedure for stating a case, the preferable course would be to have a question in the stated case that is based on an issue that actually arises before the PUB in a specific hearing, such that it raises a discrete question that is specific to a particular issue related to a real factual situation that has been presented or will be presented. The court must be provided with the necessary context to permit it to provide the answer to the question put before it. The court will not entertain or answer a stated case where the question is abstract, hypothetical, speculative, or overly broad.

48 On the issue of disclosure, the PUB has, in the past, asked that the MPIC provide specific information and/or documentation regarding the non-basic lines of business for a specific rate hearing. When the MPIC refused on the basis that the information was not relevant, the PUB did not take steps to require that disclosure; rather, it proceeded with each rate hearing without that information. In fact, the PUB has authority to require that the MPIC disclose specific information in relation to a specific rate application. I note, for example, the authority found in ss. 24(4) and 27(2)(c) of *The PUB Act* and s. 12 of the Rules of Practice and Procedure of the PUB (see Appendix A). The PUB could exercise that authority to order the disclosure of specific information and/or documentation and then the MPIC would be

obligated to respond. If there is no resolution and further proceedings are appropriate, there will be a factual background and an order or decision from the PUB upon which a court can make a decision.

## *VII. DECISION*

49 For these reasons, I have concluded that the question asked by the PUB in this stated case is too speculative to be answered, so I would decline to answer it. The questions asked by the MPIC are, likewise, speculative and involve abstract issues, and I would decline to answer them as well.

50 In the circumstances, there will be no order for costs.

_____ J.A.

I agree:

_____ C.J.M.

I agree:

_____ J.A.

# TAB 9

Citation: Manitoba Public Insurance Corp. v. Public Utilities Board, 2011 MBCA 87

Date: 20111109
Docket: AI 11-30-07579

**IN THE COURT OF APPEAL OF MANITOBA**



***B E T W E E N:***

| | | |
|---|---|---|
| ***THE MANITOBA PUBLIC INSURANCE CORPORATION*** | ) | ***J. F. Rook, Q.C.*** |
| | ) | ***R. K. Agarwal*** *and* |
| | ) | ***K. L. Kalinowsky*** |
| | ) | *for the Applicant* |
| *Applicant* | ) | |
| | ) | ***C. A. Everard Grammond*** *and* |
| | ) | ***N. D. M. Hamilton*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| | ) | *Chambers motion heard:* |
| ***THE PUBLIC UTILITIES BOARD*** | ) | ***September 22, 2011*** |
| | ) | |
| *Respondent* | ) | *Decision pronounced:* |
| | ) | ***November 9, 2011*** |

**FREEDMAN J.A.**

## INTRODUCTION

1 The Manitoba Public Insurance Corporation (MPI) seeks leave to appeal three orders (the Orders) of the Public Utilities Board (the Board) on questions of law or jurisdiction. The Orders required MPI to "allocate PIPP [Personal Injury Protection Plan] costs associated with claims by inter-provincial truckers to a non-Basic line of business." MPI says that the Board had no jurisdiction to impose such a requirement and erred in law in doing so. MPI was late filing its notice of motion for leave, so it also seeks an extension of time for its leave application. I have concluded that the extension of time, and leave to appeal, should be granted.

suggest that any change in that situation would appear to require legislation. That could mean that the Board is not entitled to review and alter any decision by MPI that was consistent with such policy.

51 MPI argued that the Board has no jurisdiction to make any order relating to MPI's non-Basic line of business. The Board did not in express terms assert such jurisdiction, although it argued that it could deny cost allocations resulting in rates that were unfair to Basic ratepayers. See also the Board's comments on jurisdiction at para. 15 above. Arguably, by the Orders, the Board has gone beyond reviewing and approving (or disapproving) Basic rates and costs, and has made an order essentially affecting a non-Basic line of business, over which it appears to have no jurisdiction.

52 The degree of deference owed by the court to the Orders in question will be a matter for the panel to determine.

# TAB 10

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Ontario

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# Energy Sector Regulation – A Brief Overview

## Our Mandate – What We Do

The Ontario Energy Board oversees the Province's electricity and natural gas sectors through effective, fair and transparent regulation and in accordance with the objectives set out in the governing statutory framework. Our mission is to promote a viable, sustainable and efficient energy sector that serves the public interest and assists consumers to obtain reliable energy services at reasonable cost.

Our work includes:

- Setting gas and electricity rates and prices
- Monitoring the financial and operating performance of natural gas and electrical utilities
- Providing consumers with the information they need to better understand energy matters
- Protecting energy consumers' interests
- Developing regulatory policy to meet emerging energy trends and challenges

## Governing Legislation

The Board's mandate and powers in relation to the energy sector are set out principally in three statutes – the *Ontario Energy Board Act, 1998,* the *Electricity Act, 1998* and the *Energy Consumer Protection Act, 2010* – and in regulations made under those statutes.

## The Need for Energy Regulation

Many industries in Canada are subject to some form of regulation governing what they can and cannot do. Energy utilities are more closely regulated than many other industries because of the more unique characteristics surrounding energy supply and delivery.

Unlike many other industries in which there are numerous companies competing to sell the same product or service, electricity and natural gas distribution and transmission are considered to be "natural monopolies".

Regulation of electricity and gas utilities is a form of "economic regulation". Laws, regulations and other requirements have been designed to address the natural monopoly position of these energy companies, acting as a substitute for the economic forces that would normally influence them in a competitive market. In that way, economic regulation of the activities of monopoly service providers protects the interests of consumers.

## Balancing Consumer and Utility Interests

As a regulator, the OEB balances the interests of consumers and utilities.

- Consumers are well served if both the pricing and the standard of service being provided are fair and reasonable. In this regard, the OEB's mandate includes setting distribution and transmission rates that are "just and reasonable" and establishing standards and conditions of service for utilities to follow in their operations.
- Utilities are well served if they are financially viable businesses. Utilities must have a reasonable opportunity to recoup costs and earn a fair return for the significant financial investment they make in order to supply and deliver energy to consumers.

## Regulating Ontario's Energy Sector – How We Do It

The Ontario Energy Board is committed to continually improving our regulatory processes to ensure that they are effective, fair and transparent. The OEB consults widely with consumer groups and other stakeholders in the natural gas and electricity sectors to ensure that we understand the issues, concerns and priorities of those we serve and regulate.

Our role as regulator of the energy sector includes:

| | |
|---|---|
| **Setting just and reasonable rates** | One of the OEB's principal functions is to set "just and reasonable rates" that utilities may collect from ratepayers for utility services. The Board sets rates using a quasi-judicial process that requires utilities to present evidence to justify any proposed rate increases through an open and transparent public hearing.<br><br>The OEB's current rate-setting process establishes base rates for each distribution utility through a comprehensive review of the utility's costs as detailed in its rate application. This review currently occurs every four years for electricity distributors and every five years for natural gas distributors. In the intervening years, the Board provides for inflationary increases adjusted by a productivity measure. |
| **Establishing requirements for service quality and conduct** | To protect consumers and other participants in the energy sector, the OEB has imposed a number of responsibilities and obligations on entities operating in the energy sector. For example, the OEB has established minimum standards for the operation of electricity distribution and transmission systems, requirements for connecting to those systems, and standards for the quality of service to be provided to consumers by electricity and gas distributors. Electricity retailers and natural gas marketers are required to follow Codes of Conduct developed by the OEB. |
| **Monitoring Compliance** | The OEB conducts audits, carries out compliance inspections and examines allegations of non-compliance to ensure that regulated entities are complying with their legal and regulatory obligations. The Board can undertake enforcement action where appropriate if a regulated entity is not in compliance. |

**Monitoring Financial Viability**

The OEB maintains ongoing oversight of the financial viability of regulated utilities. To assist in that activity, electricity and natural gas distributors are required to file financial data with the OEB. Annually, the OEB publishes a statistical Yearbook on its web site that provides the financial and service quality results for each regulated distributor for the preceding year, to provide transparency on each distributor's performance.

**Protecting Consumers**

**Increasing Consumer Awareness**

To help the public better understand energy matters and make informed energy decisions, the OEB provides a broad range of information about electricity and natural gas in Ontario through its dedicated consumer website, consumer education campaigns and province-wide community outreach programs. Using the OEB's online interactive bill calculator, consumers can estimate their monthly utility bill and see what their bill might look like based on the prices being offered by an electricity retailer or natural gas marketer.

**Investigating Complaints**

The OEB provides assistance to consumers who are experiencing service issues they could not resolve directly with their energy supplier.

**Enhancing Customer Service Rules**

The OEB has developed enhanced customer services rules that electricity utilities must follow. These rules are designed to ensure the consistent and fair treatment of electricity consumers across Ontario, regardless of who their electricity distributor is. In addition, we have reviewed the customer service practices of natural gas utilities including those specifically tailored to low-income natural gas consumers.

**Protecting Consumers in the Retail Markets**

The OEB protects the interests of consumers by regulating the conduct of entities that offer retail energy contracts to residential and small business electricity and natural gas consumers in Ontario. This includes:

- Licensing electricity retailers and gas marketers
- Requiring that they follow fair business practices
- Monitoring and, where appropriate, enforcing compliance so that electricity retailers and gas marketers are accountable if they do not follow their legal or regulatory obligations

**Helping low-income energy consumers**

The OEB has, with the assistance and cooperation of utilities, social agencies, consumer groups and other energy sector participants, developed programs and rules to help low-income energy consumers better manage their bill payments and energy costs, including:

- LEAP emergency financial assistance, which provides year-round emergency financial assistance to qualified low-income energy consumers who are having difficulty paying their bills. This assistance helps avoid disconnection.
- To assist consumers with limited financial resources, the OEB has put in place customer service rules specifically for eligible low-income electricity customers. For example, these customers can have more flexibility regarding security deposits and more time to pay outstanding bills.

| | |
|---|---|
| **Licensing** | Licensing is another important tool the OEB uses to protect energy consumers. The OEB licenses natural gas marketers who sell to low-volume consumers (residential and small commercial consumers), as well as most participants in the electricity sector (generators, transmitters, distributors, wholesalers, retailers, unit sub-metering providers, the Independent Electricity System Operator, the Ontario Power Authority and the Smart Metering Entity). A licence from the OEB provides these entities with permission to operate and outlines their regulatory requirements. |
| **Monitoring Electricity Markets** | The Market Surveillance Panel (a panel of the Ontario Energy Board), monitors the wholesale electricity market to identify inappropriate or unusual conduct by market participants and actual or potential design flaws and inefficiencies in the structure of the market and the market rules. The Panel's reports on its monitoring efforts include recommendations for mitigating the unusual conduct, flaws, and inefficiencies it identifies. The Panel may conduct investigation into any activities related to the IESO-administered markets or the conduct of a market participant, and prepare a report including any findings and recommendations upon completion of each investigation. |

# TAB 11

# UTILITIES COMMISSION ACT

## [RSBC 1996] CHAPTER 473

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**Part 5 — Electricity Transmission**

68 Definitions
69 Repealed

**Rate rebalancing**

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

(2) This section applies despite

(a) any other provision of

(i) this Act, or

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

(b) any previous decision of the commission.

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

(a) 2007 RDA Phase 1 Decision, issued October 26, 2007;

(b) order G-111-07, issued September 7, 2007;

(c) order G-130-07, issued October 26, 2007;

(d) order G-10-08, issued January 21, 2008,

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

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

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

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

**Discrimination in rates**

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

(a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or

(b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

(a) as to rate or service, subject any person or locality, or a particular

description of traffic, to an undue prejudice or disadvantage, or

(b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

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

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

(a) whether a rate is unjust or unreasonable,

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

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

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

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

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

(c) unjust and unreasonable for any other reason.

**Setting of rates**

**60** (1) In setting a rate under this Act

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

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

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

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

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

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

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

commission must

(i) segregate the various kinds of service into distinct classes of service,

(ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and

(iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates set for any other unit.

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

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

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

**Rate schedules to be filed with commission**

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

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

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

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

# TAB 12

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# Understanding Utility Regulation

## A Participant's Guide to the British Columbia Utilities Commission


Original Publication
October, 1996
*Revised: July 11, 2002*

## Introduction

The British Columbia Utilities Commission ("the B.C. Utilities Commission", "the Commission") is an independent regulatory agency of the Provincial Government that operates under and administers the *Utilities Commission Act*, attached as Appendix A. The Commission's primary responsibility is the regulation of the energy utilities under its jurisdiction to ensure that the rates charged for energy are fair, just and reasonable, and that utilities provide safe, adequate and secure service to their customers.

As a consumer of electricity or natural gas you may have concerns about the rates that you pay for these commodities, the reliability of your utility service, or the efficiency with which this energy is supplied and consumed. You may feel strongly enough that you want to get involved in regulatory proceedings for the purpose of expressing your concerns publicly and to judge for yourself the facts of rate, service or efficiency issues. The purpose of this Guide is to assist you to participate effectively and economically in the regulation of energy utilities in B.C. The Commission values public input in the issues for which it is responsible, and has prepared this Guide to help you to become more involved in our various activities.

In this chapter and the chapters that follow, background information is provided on the Province's regulated energy industries, the regulators and the processes used by regulators.

## Overview

The first critical step in getting involved with an energy issue is to identify the government department(s) or agency(ies) that has the relevant authority. This Guide focuses on the regulatory functions of the Commission. The roles and responsibilities of other government institutions in energy matters are outlined in Chapter 6.

Before one becomes involved in proceedings at the Commission, it is important to understand the reason for energy regulation. The following chapter addresses this topic.

## Why Electricity and Natural Gas Utilities are Regulated

Why are natural gas and electric utilities treated differently from so many other businesses? The justification for regulating these businesses is that they are "natural monopolies". In other words, certain characteristics of the electricity and natural gas business have made a monopoly market structure the most efficient way of providing these services. The industry is dominated by "economies of scale"; that is, the unit cost of production or delivery decreases as total demand increases. This means that one large firm can provide the goods or service at a lower cost than two or more firms. The high cost of having several companies instead of a monopoly is evident if one contemplates the possibility of several sets of electrical wires connected to each customer, with each set of wires owned by a different company competing to be the electricity deliverer for that customer. Other industries with some natural monopoly characteristics include local telephone service, water supply and railways. The term "utility" is frequently applied synonymously with natural monopoly.

Currently, there is broad agreement that the transmission and distribution components of the electricity and natural gas industries are natural monopolies. It has also been assumed that the generation component of the electricity industry exhibits substantial natural monopoly characteristics and that there are benefits from single ownership and operation. Thus, the electricity industry is frequently characterized not just by monopoly within each component, but also by "vertical integration"; that is, a single firm is responsible for several aspects of the industry, from generation to customer billing. The natural gas industry is not "vertically integrated". In B.C., many buyers and sellers make up the gas supply market, while the transmission and distribution of gas are monopolies, these services are not necessarily provided by the same company.

While the monopoly market structure can lead to cost advantages to the public, it also poses potential risks from abuse of monopoly power. If customers have no choice but to purchase energy from the only utility operating in their area, the utility could potentially charge excessive prices while paying insufficient attention to customer service.

Governments have taken two basic approaches to regulating utilities to ensure that they do not abuse their monopoly power. These are: (1) private ownership with public agency regulation, and (2) public ownership with regulation by Cabinet or by a public agency. Specifically, regulation is intended to ensure that rates are fair, just and reasonable; that utility service is adequate, safe, efficient, just and reasonable; and that a balance is achieved between customer needs and the needs of both utility owners and creditors. In B.C., a publicly owned electric utility and over a dozen privately owned

electric and natural gas utilities have been given their own service areas over which they have an exclusive monopoly (see Table 2-1, Chapter 2, pp. 7-8 for a complete listing). The Commission is responsible for reviewing and approving the rates, return on equity, operating and maintenance expenditures, and capital investments of these electric and natural gas distribution utilities. The Commission also provides economic regulation for five oil pipelines under the *Pipeline Act*.

## Regulated versus Non-Regulated Markets

In B.C., electric and natural gas utilities are regulated by the Commission. Sales of other forms of energy such as crude oil, gasoline, other petroleum products, coal, bulk propane, steam, wood and hydrogen are not regulated, except where they are distributed in a monopoly grid system. Similarly, energy which is supplied directly to a customer and bypasses the need for a transmission system or distribution grid is not affected by the current regulatory scheme for energy markets. A wind-powered water pump installed on-site is an example of an energy system that does not require access to transmission wires to deliver power service to the customer.

In addition to energy resource markets, which are not included in the *Utilities Commission Act*, there are markets which ordinarily would be regulated by the Commission but which have been granted exemptions from the *Utilities Commission Act*. Either the provincial minister responsible for the Commission or the Commission itself (with Cabinet approval) may issue exemptions to utilities which otherwise come under the *Utilities Commission Act*. Typically, exemptions from various sections of the *Utilities Commission Act* are given to independent power producers and to industries which generate power for their own use and sell surplus energy to regulated utilities or a limited number of customers in close proximity to the generator.

## Market Evolution

Wherever competitive markets can replace regulated natural monopoly markets, and lead to lower rates for a given level of service, the market structure and the role of the regulator may change. This has occurred over the last decade in the long distance telephone industry and in the production of natural gas. Natural gas production has become a competitive market while its transmission and distribution remain regulated monopolies. There has been a recent trend throughout the world for the

generation of electricity to become competitive, leaving electricity transmission, dispatch and distribution to remain regulated. The Commission is constantly assessing whether various components of current utility services can be made competitive as a result of technological advancement or other changes in the marketplace.

## Jurisdiction of the Commission

As previously noted, the Commission's regulatory jurisdiction is defined by the *Utilities Commission Act* and part seven of the *Pipeline Act*. At present, the Commission regulates eight electric utilities, ten gas utilities (two of which also provide propane service), one steam heat utility, and the economic regulation of five crude oil pipelines.

**Table 2-1**

| *ELECTRIC* | *SERVICE AREA* |
|---|---|
| British Columbia Hydro and Power Authority (a Crown Corporation) | Lower Mainland, Vancouver Island, Central and Northern B.C., Field and the East Kootenay Regions |
| Hemlock Valley Electrical Services Limited | Hemlock Valley |
| Princeton Light and Power Company, Limited | Princeton, Coalmont, Tulameen, Osprey Lake, Missezula Lake |
| Silversmith Light & Power Corporation | Sandon |
| West Kootenay Power Ltd. | West Kootenays and South Okanagan |
| Yukon Electrical Company Limited | Lower Post |
| City of Nelson | Nelson - rural area |
| Sun Rivers Services Corp. | Lot 152, CLSR Plan 78619, Kamloops IR No. 1 |

| *NATURAL GAS* | *SERVICE AREA* |
|---|---|
| BC Gas Utility Ltd. | Lower Mainland and Fort Nelson Areas, Central Interior, Okanagan, Northern Interior, and East and West Kootenays |
| Squamish Gas Co. Ltd. (a BC Gas subsidiary) | Squamish |
| Centra Gas British Columbia Inc. (a BC Gas subsidiary) | **Distribution:** Vancouver Island, Sunshine Coast **Transmission:** Vancouver Island Natural Gas Transmission Pipeline, from Coquitlam to Squamish, Sunshine Coast, Powell River, Campbell River, Port Alberni and South to Victoria |
| Pacific Northern Gas Ltd. | Summit Lake to Prince Rupert and Kitimat |
| Pacific Northern Gas (N.E.) Ltd. | Dawson Creek, Fort St. John , Rolla, Pouce Coupe and Tumbler Ridge |
| Stargas Utilities Ltd. | Silver Star Resort Community |
| Sun Rivers Services Corp. | Lot 152, CLSR Plan 78619, Kamloops IR No. 1 |
| Sun Peaks Utilities Co. Ltd. | Resort area north of Kamloops |

| *PROPANE GRID SYSTEMS* | *SERVICE AREA* |
|---|---|
| Pacific Northern Gas Ltd. | Granisle |
| Port Alice Gas Inc. | Port Alice |
| Centra Gas Whistler Inc. | Whistler |

| *STEAM HEAT* | *SERVICE AREA* |
|---|---|
| Central Heat Distribution Limited | Downtown Vancouver |

## Introduction

Now that you are familiar with the general hearing process, you will need to know more about the types of applications the Commission deals with so that you can determine how your particular interest fits into the Commission's regulatory scheme. This chapter outlines the main elements of rate making, a key part of the Commission's utility regulation responsibilities.

The Commission is responsible for setting utility rates primarily under Sections 58-64 of the *Utilities Commission Act*. Public utilities apply to the Commission when they want to change rates. The Commission reviews the application and decides whether a rate change is justified. Like any business, public utilities expect to be able to recover the cost of providing service to their customers plus a reasonable profit. The task of the Commission is to ensure that public utilities make a reasonable return on their investment while providing secure service at fair, just and reasonable rates. This involves examining the energy resource alternatives, including demand-side management options, identified by a utility in its long-term plan (IRP), the revenue requirements of a utility, a fair return to shareholders (return on equity) and how a utility's revenue requirement should be divided amongst its customer classes (rate design).

The Commission's review of the utility's application is conducted in the context of current information about the long-term plans of the utility, its recently approved capital projects and through public hearings to decide whether the requested increase is necessary. The Commission decides how much revenue the utility reasonably needs to cover the costs of providing service to its customers for the period covered by the utility's application, including how much the utility should earn for its shareholders' investment. The Commission can approve an "across-the-board" increase in rates, or a rate design hearing may be required to determine how much of the revenue required by the utility should come from each type of customer, based on the cost of providing energy service to that customer. Such a "revenue to cost ratio" is not stable over a long period of time, particularly if the costs and customer mix are changing. Therefore, rate design hearings are needed from time to time.

Typical electricity customer classes: **Table 5-1**

- residential customers - who purchase service at the local distribution voltage level;
- commercial and general service customers - who may purchase service in large quantities or at local distribution voltage levels; and

- industrial customers - who purchase services in very large amounts or at transmission voltage levels.

## Integrated Resource Planning

Integrated Resource Planning ("IRP") is a process by which a utility considers all known resources which could potentially be used to meet customers' demand for its product. Such resources include the traditional sources a utility uses to meet demand, such as new generation facilities, as well as conservation measures. In 1993, the Commission developed IRP Guidelines (see Appendix D).

The kind of information and analysis associated with an IRP will be used by the Commission under Sections 45 and 46 of the *Utilities Commission Act* in making determinations on applications for Certificates of Public Convenience and Necessity ("CPCN").

## Certificate of Public Convenience and Necessity

Section 45 of the *Utilities Commission Act* provides that no person shall begin the construction or operation of a public utility plant or system without first obtaining from the Commission a certificate declaring that the facility is required to satisfy public convenience and necessity (i.e., that it is in the public interest). The purpose of this project review process is to ensure that utilities are not making unwise investments, the cost of which they will later expect to recover in rates from their customers. For example, upon closer examination the Commission may determine that it is more cost-effective for the utility to invest in energy conservation and avoid the necessity of building another generating plant. Therefore, an energy project that has received approval under the Environmental Assessment Act or Small Power Project Review Process still requires a CPCN from the Commission before construction can begin.

The Commission issues CPCNs with conditions attached. These conditions specify the scope of the project, its schedule and its expected costs. If these and other relevant conditions are met, the utility's cost of the project will be added to its rate base for recovery in rates. If, for reasons within the control of the utility, the conditions are not met, the Commission may deny cost recovery of all or part of the costs.

## Rate Regulation

When the utility applies for an increase in rates to be charged to its customers, it must justify the revenue requirements that support the request for an increase. The primary costs associated with operating the utility are:

- the cost to build, operate and maintain the utility's facilities;
- the cost to finance debt incurred from building these facilities;
- depreciation and amortization expenses;
- the costs of financing debt generally; and
- return on shareholders' equity including the resulting income taxes.

The Commission uses a "future forecast" methodology to review utility expenditures. This means that utilities apply for rate increases prospectively, to cover expenses that they expect to incur over a specified period in the future, called the "forecast test year" period. The term "test year" refers to a typical year, usually one, two or three years in the future. Once the total revenue requirements for the test period have been determined by the Commission, this total cost is divided by the annual forecast sales volume for this period to arrive at the average rate that the utility may now charge for its services. The utility's rate tariff is then amended to adopt the new rates. In determining a utility's revenue requirements, the Commission also examines the utility's rate base, or the assets on which a utility may collect a return. If the Commission decides that any of the costs claimed by the utility in its application are not reasonable or prudent, it may disallow the recovery of those costs in customer rates.

Figure 5-1, p. 41, demonstrates the connections between long range planning (IRP) and rate base and the linkage of rate base with depreciation and amortization expenses, return on equity and ultimately with total annual revenue requirements. Utilities are required to present their revenue requirements in a set of "regulatory schedules" in the executive summaries of their applications as well as in the their

annual public reports to the Commission. These schedules are included in the appendices of the Commission decisions for the respective utility.

## Incentive Regulation - Performance Based Regulation ("PBR")

Traditional cost of service regulation discussed in the previous section has been criticized in recent years. According to the Commission's traditional method of regulating utility rates using cost of service analysis, the amount of revenue which a utility is permitted to earn is approximately equal to its costs. Revenue requirements and rates are set every year or two years based on a forward test-year (or test-years) basis. Critics argue that, using this system, utilities have insufficient incentives to operate as efficiently as they would in the competitive market place. Because a utility may recover cost increases simply by demonstrating a higher revenue requirement, a utility has little reason to strive to become more efficient and, as a corollary, keep its costs low. Increasingly, the Commission is introducing mechanisms to streamline rate setting and implement incentives to utilities to trim costs while maintaining high quality service.

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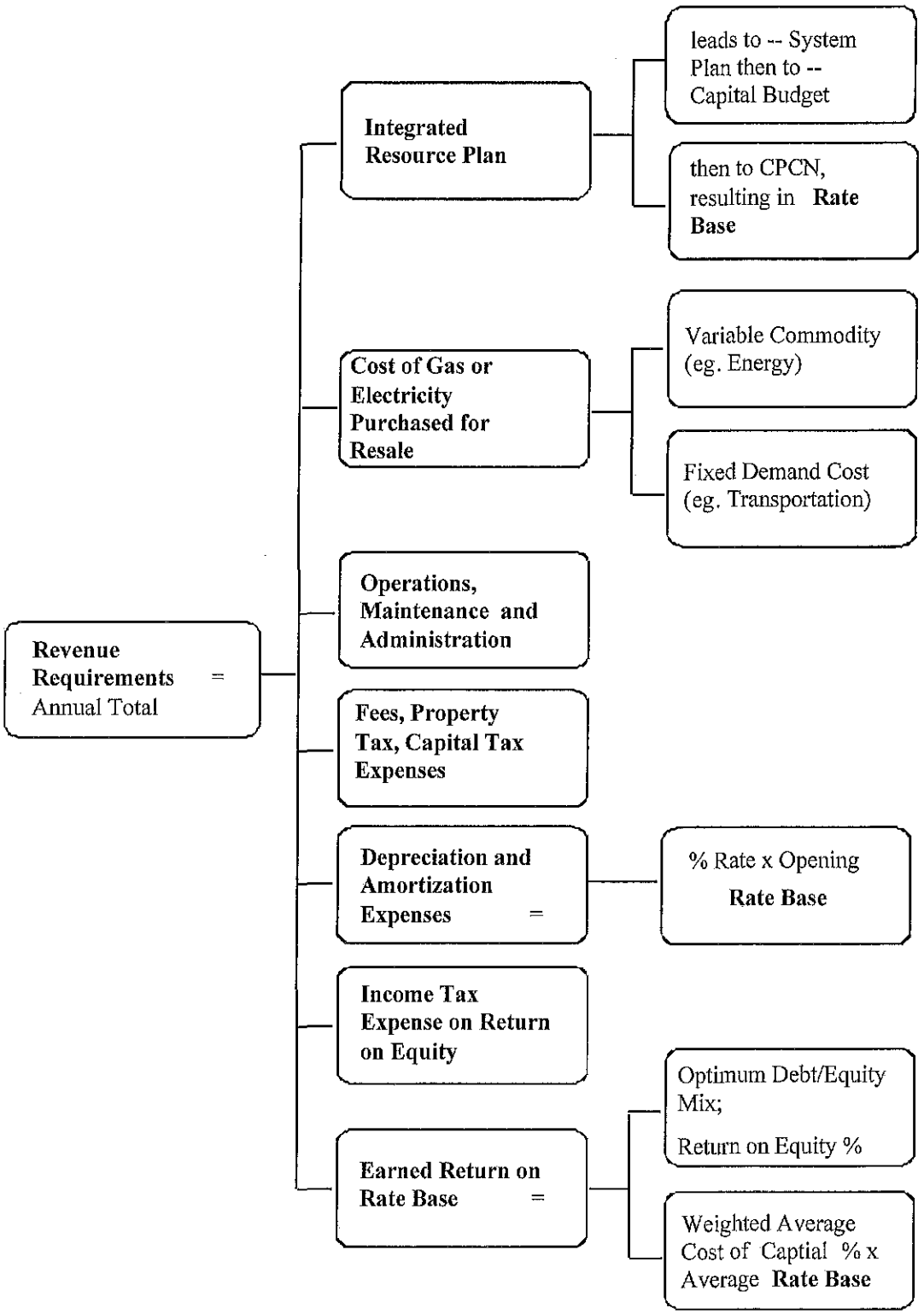
Figure 5-1
## SUMMARY OF UTILITY COST COMPONENTS



# TAB 13


# AltaLink Management Ltd.

## Reconciliation of Direct Assigned Project Capital Deferral Accounts for the May 1, 2002 to April 30, 2004 Period

**November 22, 2005**

No. 2) and a revised schedule with dates for written Argument and written Reply Argument that were dependent on a satisfactory response to Board IR No. 2.

On May 6, 2005, subsequent to a meeting between AltaLink and Board staff held at the Board's offices on May 5, 2005, AltaLink requested that the Board provide additional time to assemble certain information required to respond to Board IR No. 2. In response to this request, the Board issued correspondence, dated May 9, 2005, extending the deadline for AltaLink to respond to Board IR No. 2 to May 20, 2005.

On July 7, 2005, following the receipt of AltaLink's response to Board IR No. 2, the Board sought further clarification of information through an additional set of information requests to AltaLink (Board IR No. 3). In the same correspondence, the Board established tentative dates for written Argument and Reply to be finalized after receipt of AltaLink's response to Board IR No. 3. Following the receipt of AltaLink's response to Board IR No. 3, the Board confirmed in August 8, 2005 correspondence that the deadlines for written Argument and written Reply as set in the Board's July 7, 2005 letter would be upheld in the interest of bringing closure to the Application.

The Board received written Argument from AltaLink and the FIRM Customers on August 19, 2005 and written Reply Argument from the same parties on September 2, 2005.

The Board considers the record for this proceeding to have closed on September 2, 2005.

## 2 THE APPLICATION

In its 2002/2003 and 2003/2004 GTA, AltaLink forecast $62.2 million of direct assigned capital projects for the fiscal years 2002/2003 and 2003/2004. The actual amount of direct assigned capital projects for that period was $78.5 million.

AltaLink explained that the $16.3 million[2] difference from the direct assigned capital project forecast approved in Decision 2003-061 arose from cost increases on forecasted projects arising from scope changes, cost increases generated by new projects not included in the original forecast, and decreases caused by the cancellation of certain projects. AltaLink also indicated that $8.1 million of the $16.3 million difference was offset by customer contributions. On this basis, AltaLink calculated the applied-for $1,005,000.00 revenue requirement adjustment, consisting of return, depreciation and income tax components.

## 3 REVIEW CRITERIA

The Board notes that the FIRM Customers did not directly comment on the issue of the criteria to be applied in assessing the reasonableness and prudence of AltaLink's capital project costs.

AltaLink was of the view that the *Electric Utilities Act* (EUA) and related regulations provide little specific direction as to how the Board should assess prudent costs of AESO direct assigned capital projects. AltaLink noted that the guidance provided by the EUA and regulations is limited

[2] $78.5 million minus $62.2 million

to a general direction in Section 121 of the EUA that a Board approved tariff must be just and reasonable. Additionally, AltaLink noted that Section 122(1)(b) of the EUA provides that the Board's regulation of a transmission facility owner (TFO) must provide a reasonable opportunity for the TFO to recover the prudent costs and expenses associated with operating its regulated transmission business.

AltaLink noted that an inherent element of the Board's capital deferral account reconciliation process is that the review of costs occurs after the completion of a project and after the actual final costs of a project are known. AltaLink submitted that an after-the-fact assessment of prudence should not consider what would have happened if judgment could be exercised with the benefit of hindsight. It was AltaLink's view that prudence should be assessed on the basis of whether the utility exercised good judgement and made reasonable decisions at the time such judgement was exercised and decisions were made, based on information the utility knew or ought to have known at the time.

The Board agrees with AltaLink that, in accordance with Section 122(1)(b) of the EUA, the Board must provide a utility with a reasonable opportunity to recover its prudently incurred costs.

In addressing the issue of determining prudent behaviour, the Board notes that in other jurisdictions that regulate utilities, such as Ontario, the courts have held that actual utility expenditures are deemed to be prudent, in the absence of some evidence suggesting the contrary.[3]

In Decision 2001-110 the Board established the following test for prudence at page 10:

> In summary, a utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of the utility knew or ought to have known at the time the decision was made. In making decisions, a utility must take into account the best interests of its customers, while still being entitled to a fair return.

The Alberta Court of Appeal has upheld the Board's articulation of the prudence test, stating:

> In this case, in determining to uphold ATCO's decision unless satisfied ATCO has acted unreasonably, the Board correctly acknowledged the presumption of prudence. The test it articulated to be applied in reviewing the prudence and reasonableness of ATCO's decisions is reasonable.[4]

Although the Board will start with the presumption, confirmed by the Alberta Court of Appeal, that AltaLink has acted prudently, the presumption can only be confirmed or overturned through an examination of the information and circumstances that were available to AltaLink or that it ought to have known at the time it executed decisions in respect of the direct assigned projects. The Board's prudence review will assess if the actions undertaken by AltaLink were reasonable, demonstrated good judgment, and were undertaken with the best interests of customers in mind. An examination of these issues requires AltaLink to fully explain and support overall project costs and project cost components. The Board must ensure that this onus is met particularly if there are project components that have large differences between forecast and actual costs, appear to be high relative to industry norms, or involve affiliate transactions.

[3] See Enbridge Gas Distribution Inc. v. Ontario (Energy Board) [2005] O.J. No. 756 for example
[4] See ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board) 2005 ABCA 122 at page 14

Consideration of the prudence of the direct assigned projects can best be conducted if project cost information at some meaningful level beyond the overall cost of the project is disclosed. The Board recognizes that sometimes the appropriate type and level of information necessary to conduct this review may not be available. In that case, the full and proper application of the prudence review may be severely hampered, perhaps resulting in a situation where it is difficult to fully take into account the best interests of the utility's customers. In the Board's view, such an "information deficiency" situation should be avoided.

## 4 REVIEW OF DIRECT ASSIGNED PROJECT COSTS

In keeping with the framework described in the preceding section, the Board will review certain aspects of the Application to test the presumption of prudence and to determine if there are cost elements or management actions that need to be evaluated for prudence. The Board will also consider certain elements of the overall regulatory regime in Alberta to determine whether these elements can be relied upon to support the application of the presumption.

The Board considers that, for purposes of its review and disposition of the Application, the set of projects provided in Attachment 2 to AltaLink's February 15, 2005 supplemental filing are the appropriate ones to use for reconciliation of AltaLink's 2002/2003 – 2003/2004 capital deferral account. A summary table which provides the in-service dates, preliminary project estimates, and reported final costs for each of the projects is included as Appendix 2 to this Decision.

Based on its review of the Application and IR Responses, the Board has significant concerns with the information that was available to the Board to enable the Board to determine the prudence of the actions taken by AltaLink. Discussions between staff of the Board and AltaLink as well as two supplemental rounds of Board IRs failed to produce the information that the Board considers necessary to conduct a full and proper analysis to determine if the actions of AltaLink were in fact prudent. For the purposes of this Application, the Board is prepared to accept AltaLink's contention that cost estimating and tracking systems for the projects in question are the root cause of this situation and finds that further efforts to obtain the required information would not be fruitful. Consequently, the Board has no alternative but to make its prudence assessment with less information than the Board would have preferred.

With regard to the Board's consideration of the presumption of prudence, including whether there are elements of the regulatory regime that support this presumption, the Board will review the following matters:

- Project engineering and design costs.
- Project engineering and supervision costs.
- Examination of the Josephburg Project.
- Customer contribution for Shell Scotford 409S Project.
- The 2005 EUB regulatory audit of AltaLink Limited Partnership.
- The AESO involvement and oversight of direct assigned projects.

If the Board's review of the preceding matters as they concern prudence indicates that there are areas that require further inquiry, the Board is mindful that any prudence evaluation it conducts must be done without the benefit of hindsight.

# TAB 14

POWELL GOLDSTEIN LLP

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# Principles of Public Utiliity Rates by James C. Bonbright

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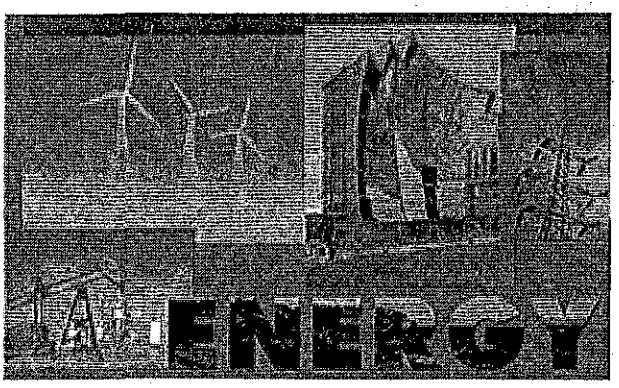

# IV

## COST OF SERVICE AS THE BASIC STANDARD OF REASONABLENESS

In stressing the fact that public utility rates, like other prices, are usually designed to perform multiple functions, the preceding chapter distinguished four functions as primary under modern rate regulation. But only casual attention was paid to the question what *measures* of reasonable rates can be expected to secure satisfactory performance of these functions, together with the question whether rates best designed to perform any one function are also best designed to perform the others. A discussion of these two related questions constitutes the main subject of the remaining chapters.

Most of the treatises on public utility economics, following the case law on rate regulation, divide the subject of rate determination into two parts. The first part is concerned with the measures of a reasonable rate level for any one company or group of companies. The second part is concerned with the principles of the rate structure or rate differentials. This distinction is essential for purposes of analysis, and it will be observed in Parts Two and Three of the present study. But it suffers the disadvantage of cutting across certain basic standards of reasonable rates, such as the cost standard, which apply, though with variations, both to rate levels and to rate relationships. In order to minimize this disadvantage, the present chapter and those that immediately follow will use a different breakdown of subject matter. First, separate chapters will be devoted to the two most frequently cited criteria of reasonable rates—cost of service and value of service. Then will come a chapter on the standard of



hypothetical competitive price—a standard often thought to embody an ideal reconciliation of cost and value factors. In sharp contrast with the competitive-price norm is a group of related rate-making standards to be considered in Chapter VII, "Social Principles of Rate Making." Chapter VIII will reclassify the tests of reasonable rates by distinguishing between considerations of "fairness" or "equity" and considerations of "functional efficiency." Only in the last chapter of Part One, a transition chapter, will attention be turned to the distinction between rate-level standards and rate-structure standards.

### *THE WIDESPREAD ACCEPTANCE OF A COST-PRICE STANDARD*

No writer whose views on public utility rates command respect purports to find a single yardstick by sole reference to which rates that are reasonable or socially desirable can be distinguished from rates that are unreasonable or adverse to the public interest. A complex of tests of acceptability is required, just as would be the case with the tests of a good automobile, a good income-tax law, or a good poem. Nevertheless, one standard of reasonable rates can fairly be said to outrank all others in the importance attached to it by experts and by public opinion alike—the standard of cost of service, often qualified by the stipulation that the relevant cost is *necessary* cost or cost reasonably or prudently incurred. True, other factors of rate making are potent and are sometimes controlling—especially the so-called value-of-service factor in the determination of the individual rate schedules. But the cost standard has the widest range of application. Rates found to be far in excess of cost are at least highly vulnerable to a charge of "unreasonableness." Rates found well below cost are likely to be tolerated, if at all, only as a necessary and temporary evil.

A cost standard of rate making has been most generally accepted in the regulation of the levels of rates charged by private utility companies. But even more significant is the widespread adherence to cost, or to some approximation of cost, as a basis of rate making under public ownership. Thus the great Hydro-Electric Power Commission of Ontario purports to apply the principle of "service at cost" in its charges for wholesale power supplied to the various

municipal distribution systems of the province. And thus most of the Federal power projects in the United States, including the Tennessee Valley Authority, purport to sell electric power at rates designed to cover operating expenses plus a compensatory return on allocable capital investment—one form of a cost-of-service standard. To be sure, critics of these projects have insisted that, under proper accounting, revenues would be shown to fall short of full-cost coverage. But the mere fact that these allegations are generally denied by the responsible managements of the Federal agencies implies that these managements themselves concede the validity of a cost principle of rate making.

Lest the foregoing remarks be taken to imply an adherence to a cost standard more rigid than the facts would justify, let me at once note exceptions. In the first place, the principle is followed far more closely as a measure of general rate levels than as a measure of individual rate schedules. In the second place, it is deliberately violated by those municipal power plants, said to be fairly numerous, that use the sale of electricity as a source of large profits for the city treasury. And in the third place, it has been waived to a minor degree through the use of indirect subsidies in support of rural electrification in the United States; and waived to a major degree through the use of heavy subsidies for rural electrification in the province of Ontario. One may also note the huge deficits incurred in the operation of the Canadian National Railways, and the failure of most metropolitan transit systems, in recent years, to charge fares that cover operating expenses plus fixed charges.

Important, however, as are these and other deviations from a cost-price standard, they are generally treated as exceptions to the general rule of rate making. In Great Britain, even a Labor Government that went much farther than did this country in the direction of socialization, including socialized medicine, did not see fit to abandon the general criterion of service at cost when it nationalized its public utilities. Instead, it instructed the various boards, such as the British Electricity Authority, to undertake to realize total revenues sufficient to meet total outlays properly chargeable to revenue account, "taking one year with another." [1]

[1] The British statutes governing the rates to be charged by the nationalized public utilities and railroads do not expressly forbid sale of services at prices designed to yield revenues *in excess* of total costs. But they have been interpreted by British commentators as contemplating the provision of service "without making, so far as possible, either a deficit or a surplus." William A. Robson, ed., *Problems of Nationalized Industry* (New York, 1952), p. 535.



## *THE THREEFOLD RATIONALE OF A COST-PRICE STANDARD*

No doubt one of the reasons for the popularity of a cost-of-service standard of rate making lies in the flexibility of the standard itself. "Cost," like "value," is a word of many meanings, with the result that persons who disagree, not just on minor details but on major principles of rate-making policy, may all subscribe to some version of the principle of "service at cost." The best known, though not the most important, illustration of such a disagreement is that between supporters of an "original-cost" basis of rate making and supporters of a "reproduction-cost" basis.[2]

But before turning attention to alternative meanings of "cost of service," let us first ask ourselves what reasons are advanced in favor of *any* cost-price standard of rate making—of any standard under which an attempt is made to transfer the cost of supplying the service from the producer to the consumer, no more and no less. The answer is that there are at least three related, though not identical, reasons, each one associated with a different function of public utility rates.[3]

The first support for the cost-price standard is concerned with the consumer-rationing function when performed under the principle of consumer sovereignty. Under this principle, potential consumers should be free to enjoy whatever kinds of service, in whatever amounts, they desire as long as they are ready to indemnify the producers, and hence society in general, for the costs of rendition. Only in this way can the consumers be put in a position, as it were, to ration themselves by striking a balance between benefits received and sacrifices imposed. If the rates were set at less than cost, either

[2] A more important disagreement is that between those who identify "cost of service" with some kind of average or prorated total cost, and those who identify it with differential or marginal or out-of-pocket cost.

[3] A fourth possible defense of a cost-price standard of utility rates is suggested by the British economist Professor W. Arthur Lewis as applicable to the British public corporations which now operate the major utility and railway enterprises. These corporations, he declares, should make neither a loss nor a profit after meeting all capital charges, because "to do otherwise is to contribute either to inflation or to deflation." Robson, ed., *Problems of Nationalized Industry*, p. 181.

overt rationing would be necessary or else service would have to be supplied in wasteful amounts. If the rates were set at more than cost, use of the services thus priced would be unduly restricted.

But the pricing of public utility services at cost of production is supposed not only to bring about a proper control of demand; in addition, and at the same time, it is supposed to motivate and enable the producing company to supply the service in the amount demanded, thereby avoiding the need for resort to tax-financed subsidies. That is to say, the sale of the service at cost will supply the company with necessary revenues to pay operating expenses and capital charges. For this purpose, to be sure, cost must be given a broader definition than is customary in the language of accounting, since it must include allowance for a capital-attracting rate of return on investment. But a capital-attracting rate of profit is here considered a part of the necessary cost of service.

The third defense of the cost-price standard is related to the income-distributive function of rates in the more generally acceptable version that I have called, in Chapter III, the "compensation version." Under this version, an individual with a given income who decides to draw upon the producer, and hence on society, for a supply of public utility services should be made to "account" for this draft by the surrender of a cost-equivalent opportunity to use his cash income for the purchase of other things.[4]

Of the four primary functions of rates set forth in the preceding chapter, the only one that may require a deviation from *any* kind of a cost-price standard is the management-incentive function, which calls upon the price system to impose penalties for inefficient management, and to award special profits for superior performance. But even this function could be subserved, in theory at least, by a factitious definition of cost to mean, not necessarily the cost of service actually incurred under the existing management, but rather an estimate of the cost that *would be* incurred under a management of standard efficiency. The application of such a hypothetical-cost criterion presents formidable practical difficulties. But American

[4] Compare F. M. Taylor's discussion of price fixing in a socialist economy, in which Taylor declares that, under socialism, prices should equal cost of production in order to give meaning to any given income-allotment by the state to the individuals therein. "The Guidance of Production in a Socialist State," 19 *American Economic Review* 1–8 (1929).



regulation has attempted a very limited and crude application through the acceptance of the doctrine that, in public utility rate cases, companies may secure reimbursement only for "prudent" or "legitimate" or "reasonable" operating expenses and capital outlays. Some commissions, moreover, have purported to consider efficiency factors in their allowance of a fair rate of return.[5]

## *PARTIAL CONFLICT AMONG THE THREE OBJECTIVES OF A COST-PRICE STANDARD*

In view of what has just been said, one might suppose that, with the possible exception of the management-efficiency function, all of the primary functions assigned to public utility rates could be performed in complete harmony, since all of them agree in calling for a cost-price measure of reasonable or optimum rates. That is to say, when utility rates are fixed at costs, they will simultaneously serve effectively (a) to keep the demand for the service within economic bounds without resort to overt rationing, (b) to enable and induce private capital to undergo the expenses of supplying whatever service is thus demanded, and (c) to transfer from the consumer beneficiaries to the producing enterprise, and hence to the suppliers of the "factors of production," compensatory amounts of purchasing power. This harmony of objectives under a cost-price system of rate regulation would thus be similar to the harmony of functions supposedly performed by unregulated prices when determined under the forces of market competition.

Unfortunately, however, the harmony attainable under a cost-price system of utility rates is far from complete. On the contrary, the functions are in partial conflict, sometimes seriously so. The major source of the conflict lies in the fact that a cost-price standard is subject to many different interpretations and that the interpretation which would best comport with any single objective of rate making is almost sure to be ill-adapted to the attainment of some of the other objectives. Some of the more serious dilemmas presented by different meanings of "cost of service" will be noted briefly in the following paragraphs.

[5] See Chap. XV.

# TAB 15

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*The*

# PROCESS

# OF

# RATEMAKING

*Volume I*

*By*

**Leonard Saul Goodman**

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Computation and allocation of costs of service lies at the heart of the tasks of a regulatory agency's administration of the just and reasonable standard. As the Supreme Court early held, a rate that is below the cost of the service is "intrinsically just and reasonable."[1] The "long and often judicially approved practice of basing rates on cost carries a substantial presumption of validity which places a heavy burden on those who would refute it."[2]

Among the questions that continually vex the regulatory commissions are, a) what costs should be covered by the rates for a particular service; b) what procedures and standards apply to identify those costs; and c) how should the costing of services relate to the required accounting and reporting by the regulated company?

The courts acknowledge that cost allocation is not an exact science, and that generally the legislature leaves the choice of methods to perform the allocation to the judgment of the rate-setting agency.[3] Nevertheless, there are numerous, settled principles at work here, that bear directly on the way an agency can and does find and use costs of service in its rate cases.

**Jurisdictional v. non-jurisdictional.** Like the separation of revenues,[4] an initial separation of costs of service must precede a rate proceeding. Many regulated companies serve in more than one state, and costs must be allocated to the affected jurisdictions. If a company is engaged in both intrastate and interstate business, the costs incurred in its interstate business may be subject to the jurisdiction of a federal regulatory agency (in which case the federally approved separation rules take precedence over state mandated separation).

Interstate costs are not necessarily indicative of the intrastate costs for an individual state. The failure to find state-specific costs is a failure to establish the rates on substantial evidence, that is, a failure to show a reasonable relationship between rates and costs of service.[5]

The F.C.C. separation rules[6] for telecommunications companies not only establish the relative assignment of their costs as between intrastate and interstate business, but also provide an accounting framework that is widely accepted in the states for such companies. The California commission, among others, follows the F.C.C. cost allocations in its regulation of intrastate LEC services, except for two basic differences.[7]

Typically jurisdictional services are separated from non-jurisdictional through a series of cost and revenue allocations. The F.C.C. rules follow the accountant's assignment of direct and indirect costs.[8] When an allocator cannot be found, a "general allocator" must be used based on the ratio of all expenses directly assigned or

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[1] I.C.C. v. Chicago, B.& Q.R.Co., 186 U.S. 320, 339 (1902).

[2] Shell Oil Co. v. F.P.C., 520 F.2d 1061, 1083-84 (5th Cir. 1975).

[3] National Ass'n of Greeting Card Pubs. v. U.S. Postal Service, 462 U.S. 810, 825-26 (1983), and cases there cited.

[4] *See* p. 241, *supra*.

[5] Telecommunications Resellers v. Pub.Svc.Comm'n, 747 P.2d 1029, 1031 (Utah 1987).

[6] 47 CFR Part 64.

[7] Re Regulatory Frameworks for LECs, 125 PUR4th 260, 265-66 (Cal.PUC, 1991). California follows the F.C.C. rules except for omission of tariff imputation mandated by the F.C.C. and plant allocation based on three-year forecasted plant usage.

[8] 47 CFR Part 64.

# TAB 16

*The*

# PROCESS

# OF

# RATEMAKING

*Volume II*

*By*

**Leonard Saul Goodman**

Public Utilities Reports, Inc.
Vienna, Virginia
1-800-368-5001

1998

were shown that by eliminating the specifically alleged inefficiency the carrier would suddenly earn a fair return on its total operations and become "revenue adequate."[1] At the same time that the commission created a burden of proving systemwide inefficiency, the complaining party's attempts to seek information from the railroads "must be specific by identifying particular commodities or rates or routes" without "sweeping general allegations of systemwide inefficiency."[2]

The I.C.C. rejected evidence of differing profit margins within a system of railroads as evidence of inefficiency of one of the constituent railroads, since there may be "other possible reasons for the differences," such as differences in operating characteristics. If the witness was unable to describe which reason or reasons "actually cause said difference in the profit margin," the commission would not find inefficiency.[3]

The commission rejected a comparison of the operating performance of the subject railroad with that of another railroad, when the witness failed to determine "whether or not there are differing characteristics which would cause inherent differences in operating performances," such as differences in gradients (levels of the terrain over which the railroad operated).[4] If comparative data were presented, the commission required the use of "generally accepted standards," namely "a representative sample of various members of the railroad industry."[5]

**EFFICIENCY IN THE PUBLIC INTEREST.** The phrase "honest, economic and efficient management," as a phrase of art, made its initial appearance on the national scene in 1920.[6] As looked-for attributes of company costs and profits, it had long been followed as a standard prior to 1920. Early cases before both the courts and the I.C.C. included the consideration of mismanagement under the general authority to establish a just and reasonable rate. The Supreme Court, for example, expressly included the assurance of economy and efficiency as one of the directly related aspects of the "public interest" which all regulation strived to uphold.[7]

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[1] Petition of L.& N.—Review—Decision of PSC of Ind., 367 ICC 639, 645-46 (1981), citing Coal Rate Guidelines—Nationwide, I.C.C. Ex Parte Docket No. 347 (Sub-No. 1) (not printed), decision served Feb. 24, 1983, p. 14, note 40; Arkansas P.& L.Co. v. Burlington Northern R.Co., 3 ICC2d 757, 766 (1987). The Petition of L.&N. case was a proceeding under 49 U.S.C. §11501(c) under which the I.C.C. reviewed state procedures and standards for deciding the reasonableness of railroad intrastate rates. *See also* discussion of the Long-Cannon factors of the I.C.C. at p. 372.

[2] Petition of L.&N., *supra*, 367 ICC at 646.

[3] *Id.* at 651.

[4] *Id.* at 651-52.

[5] *Id.* at 652.

[6] Section 422 of the Transportation Act of 1920, 41 Stat. 488, codified as 49 U.S.C. §15a(2) (now repealed) first authorized the I.C.C. to consider railroad rate of return in rate cases subject to the managerial test. In Section 205 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 220, Congress amended Section 15a(2) to incorporate the following "Rule of Ratemaking":

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

[7] U.S. v. Lowden, 308 U.S. 225, 230 (1939).

**Comparative operating costs.** ***Early I.C.C. precedent.*** In 1910, when the railroads first proposed general rate increases to meet cost increases, the I.C.C. was authorized by Congress only to consider the reasonableness of the total rates as increased and not the incremental four or five percent increases themselves. Congress had empowered the commission to suspend the effectiveness of the increased rates while placing the burden of proof on the railroads. The I.C.C. overnight was asked to turn from hearing individual rate complaints to ensuring that the railroad industry kept up with an inflationary economy. It disapproved the general increases when the carriers were unable to explain why they could not defend all their rates nor even control their costs:[1]

> No general advances in rates should, however, be permitted until carriers have exhausted every reasonable effort toward economy in their business.... An examination of the statistics before us shows the widest divergence in the cost of doing the same thing upon different railroads. It appears, for example, that the cost of maintaining locomotives per train-mile for the year 1910 was 9.22 cents upon the Baltimore & Ohio as compared with 6.15 cents upon the Boston & Maine.... [R]ailroads in the future must be prepared to explain these apparent differences in their operating costs and to show reasonable diligence.

Based on the data for 1910, it found no need for an increase in net carrier revenues.[2]

The I.C.C. repeated these admonitions when the Eastern railroads applied once again four years later for a general rate increase. The commission again rejected the plea, adding that the carriers should consider increases in passenger fares, and increases in unremunerative rates that had originated in "fierce competition for traffic or under the menace of the big traffic of powerful shippers." Railroads provided many "special services" at no or inadequate charges. Railroads needed "a careful review of methods for increasing freight-car efficiency" and "possible economies in operation," rather than general rate increases.[3]

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[1] Advances in Rates—Eastern Case, 20 ICC 243, 279-80 (1911); *and see* Advances in Rates—Western Case, 20 ICC 307 (1910).

[2] Prof. Martin ignores the I.C.C.'s jurisdictional limitations to consider revenue need prior to 1920 in his indictment of the commission's handling of these early general increase cases. He objects to Brandeis' role in advocating on behalf of shippers that the carriers should pay more attention to economy and efficiency. However, he also shows the many weaknesses in the case presented by the railroads, especially their failure (they "missed completely") in what appeared to Martin much later as potentially "devastating rebuttal" to Brandeis' evidence of "scientific management" needed by the railroads and potential savings of $1 million per day. Martin, Albro, Enterprise Denied: Origins of the Decline of American Railroads, 1897-1917, Columb. Univ. Press, N.Y., pp. 194-223 (1971). Costs were up due to new investment in new technology (like the airlines experienced in the 1960s); but "an annual savings of $300 million, if predicated on labor's being 5 percent inefficient, implied an annual wage bill of six billion dollars," when total rail labor costs per year were then only $1.1 billion (*id.* at 218). "To save $300 million the railroads would have had to eliminate nearly one-third of all their employees" (at 219). On the other hand, Prof. Martin does not take into account non-labor savings; track mileage owned by the carriers, for example, reached a peak in about 1916 and steadily declined thereafter.

[3] The Five Percent Case, 31 ICC 351, 407-13 (1914). The I.C.C. appointed Louis D. Brandeis its first "special counsel" to represent the public interest in this proceeding. Prof. Martin agrees only that Brandeis "brought to the investigation some of the economic inquisitiveness which the Commission was so incapable of supplying on its own" and "added considerable depth to the proceedings." Martin, Albro, Enterprise Denied (etc.), *supra*, at 273, note 13.

However, as the country entered the First World War and cost increases multiplied, the I.C.C. at times disregarding patent mismanagement,[1] authorized railroad rate increases to meet cost increases.[2]

***Relation to efficient planning.*** Most commissions today require regulated electric utilities to engage in and file formal plans subject to agency scrutiny for least cost planning of their demand and supply side generating resources.[3] California in addition conducts an annual review of an LDC's gas supply and storage operations, and will disallow a portion of its purchased gas costs if the evidence shows the LDC should have purchased more spot gas before winter set in.[4]

***Other state practice.*** An electric utility in Iowa used charter aircraft owned by an affiliated company; the agency found that a non-subsidiary of the utility's parent had negotiated a lesser rate and disallowed all such costs in excess of those paid by the non-subsidiary.[5] The commission had earlier found that the utility's use of charter aircraft had benefited the utility and was a practice engaged in by most Iowa businesses.

The Kentucky commission usefully observed that a company's effort to downsize its workforce does not imply that the company has excessive employees. The argument that excess employees are implied by the company action is a "facile argument" that, if adopted, can only result in discouraging "the sort of cost conscious review which led to the downsizing."[6]

Where a company's billing practices relating to large power customers result in delays of over 8.5 days from the time meters are read until a bill is issued, a commission may disallow the inefficient delay days from working capital. The Louisiana commission has found that in such a case the billing procedure is cumbersome, labor intensive and lengthy; and "ratepayers should not bear the cost of the Company's inefficiency."[7]

**Excessive purchases.** An agency will deduct excessive purchases of water by a water utility if it finds that the amounts purchased are in excess of customer needs.[8] In some states by statute or agency practice efficiency is measured against the standard whether the expenditure is the "least-cost."[9] Where the issue concerns purchased gas costs of an LDC, there is the offsetting consideration of the stability of gas supply.[10] State commissions regularly use comparisons of purchased gas costs to

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[1] *E.g., see* Proposed Increases in New England, 49 ICC 421, 435-36 (1918) (despite the "fraudulent or wasteful exploitations" of the New York, New Haven & Hartford Railroad, still it was "entitled to such rates as will keep its return on its carrier property at least up to the standard of the past three years").

[2] The Five Percent Case, 32 ICC 325 (1914) (Report on Supplemental Hearing). Earlier increases had been allowed in the Midwest. Advances in Rates, Western Case, 20 ICC 307 (1911).

[3] Discussed at pp. 1065, 1079, *infra*.

[4] Re Southern Calif. Gas Co., 126 PUR4th 129, 148-49 (Cal.PUC, 1991).

[5] Re Iowa Electric Light and Power Co., 118 PUR4th 179, 190-91 (Iowa UB 1990).

[6] Re Union Light, Heat and Power Co., 146 PUR4th 81, 94 (Ky.PSC, 1993).

[7] Re Gulf States Utils. Co., 159 PUR4th 54, 70 (La.PSC, 1994).

[8] Re Pine Hollow Water Co., 153 PUR4th 203, 207 (Utah PSC, 1994).

[9] *See* p. 301.

[10] *See also* p. 880.

determine whether an LDC's gas purchases are prudent, or whether they comport with least-cost requirements in the jurisdiction.[1]

Under a statute that required the Virginia agency to disallow fuel costs of an electric utility that resulted from the utility's failure "without just cause ... to make every reasonable effort to minimize fuel costs," it disallowed one-half the fuel costs that might have been saved under perfect planning for outages of generating units. While "a standard of perfection cannot be expected ... the company should have been better prepared."[2]

**Excessive salaries.** A regulated company may not, "by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"[3] "[E]xtraordinary, unusual and extravagant amounts paid by a corporation to its officers in the guise and form of compensation for their services, but having no substantial relation to the measure of their services and being utterly disproportioned to their value are not in reality payment for services and cannot be regarded as 'ordinary and necessary expenses.'"[4]

The Oklahoma commission, while affirming its authority to adjust downward the amounts included in cost of service for salary levels found to be excessive, and indeed refusing to find that the paid salaries were "not imprudent or inefficient," still would not disallow any of the company's managerial salaries.[5] It urged both the company and commission staff to "monitor ... these expenses." It did reject a "signing bonus" paid to management employees in addition to agreed wages. It here found the utility's wages are "generous almost to the point of excessive."[6]

The I.C.C. held that the salaries paid in prior years may be considered as evidence for comparative purposes; "deficiencies or lack of salaries in the past cannot be compensated for by current allowances nor by unreasonable increases to be charged concurrently to operating expenses."[7]

A similar rule applies in insurance ratemaking. The NAIC model law for regulation of property and casualty insurance rates in a file and use state provides:[8]

> A rate in a noncompetitive market is excessive if it is likely to produce a profit that is unreasonably high for the insurance provided or if expenses are unreasonably high in relation to services rendered.

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[1] *See* p. 880.

[2] Re Virginia Elec.and Power Co., 118 PUR4th 275, 276 (Va.SCC, 1990).

[3] Chicago & G.T.R.Co. v. Wellman, 143 U.S. 339, 346 (1892).

[4] Botany Worsted Mills v. U.S., 278 U.S. 282, 292 (1929). An agency, of course, is not the financial manager of the company and it cannot "ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers." PUC ex rel. Springfield v. Springfield Gas & Elec. Co., 291 Ill. 209, 234, 125 N.E. 891 (1919), cited with approval in Missouri ex rel. S.W. Bell Tel. Co. v. PSC, 262 U.S. 276, 289 (1923).

[5] Re Southwestern Bell Tel.Co., 137 PUR4th 63, 87 (Okla.CC, 1992), and cases cited.

[6] *Id.* at 90. The commission disallowed termination payments to employees only because there was great fluctuation from year to year in these costs and not because of their amount. *Id.* at 91.

[7] Excess Income of Roscoe, S. & P.Ry.Co., 180 ICC 383, 404 (1932).

[8] "Property and Casualty Model Rating Law (File and Use Version)," Sec.5, in Model Ins.Laws, Regs., and Guidelines, vol. 4, NAIC, K.C., Mo., p. 775-5 (1993). By 1993, 36 states had adopted the model or similar legislation, and 14 other states (incl. D.C.) had adopted related legislation or regulations.

# TAB 17

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# FUNDAMENTALS OF ENERGY REGULATION

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2013
Public Utilities Reports, Inc.
Reston, Virginia

disincentive for investment by both foreign and domestic investors, which reduced income from taxes for the government in the long term.[8]

## 3.3 Key Regulatory Principles

Ideally, *Good Utility Practice* incorporates three regulatory principles that determine whether utilities will be allowed to recover their costs and earn a return on their capital investments. These principles combine regulatory "carrots and sticks" to encourage utilities to make disciplined economic operating and investment decisions. In determining the revenue requirement, costs and investments are examined as to whether they are (1) "prudent," (2) "used and useful," and (3) "known and measurable."[9]

Allowed expenses, whether capital or operating, must satisfy these principles to be part of a firm's revenue requirement. Those that do are called *above-the-line* expenses, and they can be included in the firm's revenue requirement. Those that fail to satisfy any of the three principles are called *below-the-line* expenses, and they cannot be included in the revenue requirement. In essence, below-the-line expenses cannot be charged to ratepayers. Of course, the regulated firm that wishes to lard its executives with luxurious cars and lavish offices is still free to do so. However, the associated expenses should be borne by the company's shareholders alone.

### Prudence and Prudent Management

Under *Good Utility Practice,* a regulated firm's operating and investment decisions are typically considered prudent unless proven otherwise.[10] In other words, utility management is given the benefit of the doubt, and management's decisions are presumed reasonable unless the facts show otherwise. For example, the regulator would need to establish that providing luxurious cars and lavish offices to the regulated firm's executives was not a necessary part of providing electric service. Moreover, the prudence of managerial decisions must be judged on their reasonableness at the time those decisions were made and based on information then available. Prudence is not meant as an exercise in hindsight regulation. In essence, a

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8 Many UK blue chip companies moved their headquarters out of the UK in 2008 as a reaction to the UK Labor government windfall tax policies, see "Windfall Tax and Blue Chip Exodus Spell Double Trouble for Darling," *Financial Times,* August 31, 2008.

9 Some regulators include the "just and reasonable" standard as a fourth principle. However, the just and reasonable standard really applies to rates and tariffs, not costs.

10 For example, US Supreme Court Justice Brandeis referred to the prudence of investments as follows: "Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown," *Missouri ex rel. Southwestern Bell Tel. Co. v. Mo. PSC,* 262 US 276 (1923).

11 *See* Harvey Averch a
December 1962, 1052
sis," *Journal of Politica*
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12 Although less commo
requirements establish

13 *Re Western Mass. Elec.*

14 For a much more deta
Electric Industry," *En*

# TAB 18

2004 CAF 149, 2004 FCA 149
Federal Court of Appeal

Transcanada Pipelines Ltd. v. Canada (National Energy Board)

2004 CarswellNat 2545, 2004 CarswellNat 987, 2004 CAF 149, 2004 FCA 149, [2004] F.C.J. No. 654, 319 N.R. 171

# Transcanada Pipelines Limited, Appellant and The National Energy Board, Canadian Association of Petroleum Producers, Centra Gas Manitoba Inc., Coral Energy Canada Inc., Industrial Gas Users Association, Mirant Canada Energy Marketing, Ltd., and Ontario Minister of Energy, Respondents

Noël J.A., Rothstein J.A., Sharlow J.A.

Heard: February 16, 2004
Judgment: April 5, 2004
Docket: A-327-03

Counsel: Mr. Alan J. Lenczner, Ms Risa M. Kirshblum, Ms Wendy Moreland, for Appellant
Ms Margery Fowke, for Respondent, National Energy Board
Mr. John J. Marshall, Q.C., Mr. Don Davies, for Respondent, Canadian Association of Petroleum Producers
Mr. Alan Mark, for Respondent, Coral Energy Inc.
Mr. Peter C.P. Thompson, Q.C., Mr. Vincent J. DeRose, for Respondent, Industrial Gas Users Association
Mr. Keith F. Miller, for Respondent, Mirant Energy Marketing Canada Inc.
Mr. John Turcnin, Ms Sara Blake, for Respondent, Ontario Minister of Energy

Subject: Natural Resources; Civil Practice and Procedure

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Oil and gas --- Statutory regulation — Federal boards — National Energy Board**

In 1994, National Energy Board conducted public hearing into cost of capital of certain pipelines including T Ltd.'s M pipeline — Purpose of hearing was to fix cost of capital for pipelines for period commencing January 1, 1995, and to establish automatic mechanism to adjust rate of return on equity in future in order to avoid expense of litigating annual or biennial changes to rate of return on equity — As result of proceeding, board issued reasons for decision in March 1995 fixing M's return on equity for 1995 test year at 12.25 per cent based on deemed capital structure of 70 per cent debt and 30 per cent equity — Board also established adjustment mechanism by which rate of return on equity would be adjusted on January 1 in 1996 and each subsequent calendar year — By 2001, T Ltd. concluded that application of formula was understating its required rate of return on capital — T Ltd. applied, pursuant to s. 21(1) of National Energy

  

Board Act, for review and variance of 1995 decision to allow for determination of fair return for for years 2001 and 2002 — Board found that T Ltd. had not raised doubt as to correctness of its 2002 decision and dismissed application for review and variance — T Ltd. appealed — Appeal dismissed — National Energy Board Act contains no provisions or directions which require board to determine pipeline's rate of return on capital, but only requires that all tolls be just and reasonable — Board did not err in taking customer or consumer interests into account in determining rate of return on capital — Tolls must be just and reasonable from point of view of M's customers and ultimate consumers who rely on service from M and, accordingly, customers and consumers have interest in ensuring that M's costs were not overstated — Board did not fetter its discretion by refusing to depart from automatic adjustment mechanism it had used to establish M's rate of return on equity — Adjustment formula was part of order that continued to bind T Ltd.

**Table of Authorities**

**Cases considered by *Rothstein J.A.*:**

*British Columbia Hydro & Power Authority v. Westcoast Transmission Co.* (1981), 36 N.R. 33, [1981] 2 F.C. 646, 1981 CarswellNat 25, 1981 CarswellNat 25F (Fed. C.A.) — considered

*Edmonton (City) v. Northwestern Utilities Ltd.* (1929), [1929] S.C.R. 186, [1929] 2 D.L.R. 4, 1929 CarswellAlta 114 (S.C.C.) — followed

*Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)* (1992), 66 B.C.L.R. (2d) 1, 12 B.C.A.C. 1, 23 W.A.C. 1, 1992 CarswellBC 88 (B.C. C.A.) — referred to

**Statutes considered:**

*National Energy Board Act*, R.S.C. 1985, c. N-7
Generally — referred to

s. 21(1) — considered

s. 22 — pursuant to

s. 23(1) — referred to

s. 60(1) — referred to

s. 62 — referred to

**Rules considered:**

*National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208
R. 44 — referred to

R. 44(2)(b)(i) — referred to

APPEAL by owner of pipeline pursuant to *National Energy Board Act* of decision of National Energy Board concerning fixing of rate of return on capital permitted for owner's natural gas transmission system.

  

29 The *National Energy Board Act* contains no provisions or directions which require the Board to determine a pipeline's rate of return on capital. The Act only requires that "all tolls be just and reasonable." Subsections 60(1) and section 62 provide:

> 60. (1) A company shall not charge any tolls except tolls that are
>
> (a) specified in a tariff that has been filed with the Board and is in effect; or
>
> (b) approved by an order of the Board.
>
> 62. All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.
>
> 60. (1) Les seuls droits qu'une compagnie peut imposer sont ceux qui sont_:
>
> a) soit spécifiés dans un tarif produit auprès de l'Office et en vigueur;
>
> b) soit approuvés par ordonnance de l'Office.
>
> 62. Tous les droits doivent être justes et raisonnables et, dans des circonstances et conditions essentiellement similaires, être exigés de tous, au même taux, pour tous les transports de même nature sur le même parcours.

30 The authority of the Board to determine just and reasonable tolls is not limited by any statutory directions. The broad authority of the Board was well articulated by Thurlow C.J. in *British Columbia Hydro & Power Authority v. Westcoast Transmission Co.*, [1981] 2 F.C. 646 (Fed. C.A.), at 655-56:

> There are no like provisions in part IV of the *National Energy Board Act*. Under it, tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the broadest of terms to make orders with respect to all matters relating to them. Plainly, the Board has authority to make orders designed to ensure that the tolls to be charged by a pipeline company will be just and reasonable. But its power in that respect is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved. In particular, there are no statutory directions that, in considering whether tolls that a pipeline company propose to charge are just and reasonable, the Board must adopt any particular accounting approach or device or that it must do so by determining cost of service and a rate base and fixing a fair return thereon.

31 The Board has adopted a cost of service method for determining the Mainline's tolls. Before this Court, counsel for a number of the respondents suggested different methodologies for determining just and reasonable tolls that would be open to the Board, such as:

1. tolls based on agreements between pipelines and shippers;

2. tolls based on charges of other pipelines;

3. use of base year tolls adjusted for inflation;

4. tolls based on mechanisms to encourage utilities towards greater efficiency.

  

As no particular methodology is required by the *National Energy Board Act*, the Board could have adopted a different methodology for determining just and reasonable tolls for the Mainline.

*b) Having adopted a cost of service methodology, the costs determined by the Board must be just and reasonable to both the Mainline and its users.*

32 In the case of the Mainline, the Board has adopted a cost of service methodology whereby the Mainline is to be compensated through tolls for its prudently incurred costs, including its cost of capital, and in particular, its cost of equity capital. Once it did so, it had to faithfully determine the Mainline's costs based on the evidence and its own sound judgment.

33 Cost of equity for a future year cannot be directly measured and therefore must be based on estimates. The Board must choose an estimate that allows the Mainline to earn what has been termed a "fair return." In *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at 192-93, the Supreme Court defined a fair return in the following terms:

> The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

Tolls which reflect a fair return on capital will be just and reasonable to both the Mainline and its users.

34 To put the matter another way, when the cost of service methodology is used to determine just and reasonable tolls, if the Board does not permit the Mainline to recover its costs because it has understated the Mainline's cost of equity capital, the Mainline will be unable to earn a fair return on equity. The tolls will therefore not be just and reasonable from the Mainline's point of view. On the other hand, the tolls must also be just and reasonable from the point of view of the Mainline's customers and the ultimate consumers who rely on service from the Mainline. Therefore, customers and consumers have an interest in ensuring that the Mainline's costs are not overstated. As respondents' counsel pointed out, there are numerous costing issues that may be subject to challenge. Questions may arise about, among other things, the allocation of costs between the Mainline and other divisions of the appellant; whether costs have been, or are being, prudently incurred; and whether the Mainline's compensation plans are reasonable. And, specific to this appeal, customers and consumers have an interest in ensuring that the Mainline's cost of equity is not overstated.

*c) The Board did not improperly consider the impact on customers or consumers of increasing tolls to reflect the appellant's costs.*

35 In oral argument, the appellant conceded that it does not object to its customers having input into the Board's cost determinations and in particular, its cost of capital determination, provided the issues in dispute are restricted to the costs of the Mainline. However, the appellant does object to the Board taking the impact of tolls on customers and consumers into account in determining the Mainline's cost of equity capital. The appellant says that the required rate of return on equity must be determined solely on the basis of the Mainline's cost of equity capital. The impact of any resulting toll increases on customers or consumers is an irrelevant consideration in that determination. The appellant does concede that when the final tolls are being fixed, the impact on the customers and consumers may be relevant, but insists that it is irrelevant when determining the required return on equity.

 

# TAB 19

# require



[ri-**kwahy*uh* r**] Spell Syllables

Synonyms Examples Word Origin

verb (used with object), **required, requiring.**

1. to have need of; need:
   *"He requires medical care."*

2. to call on authoritatively; order or enjoin to do something:
   *"to require an agent to account for money spent."*

3. to ask for authoritatively or imperatively; demand.

4. to impose need or occasion for; make necessary or indispensable:
   *"The work required infinite patience."*

5. to call for or exact as obligatory; ordain:
   *"The law requires annual income-tax returns."*

6. to place under an obligation or necessity:
   *"The situation requires me to take immediate action."*

7. *Chiefly British.* to desire; wish to have:
   *"Will you require tea at four o'clock?"*

verb (used without object), **required, requiring.**

8. to demand; impose obligation:
   *"to do as the law requires."*

# TAB 20

(http://blog.dictionary.com/welcome-to-our-new-redesign/)

# necessary (http://static.sfdict.com/staticrep/dictaudio/N00/N0053300.mp3)

[**nes**-*uh*-ser-ee] Spell Syllables

Synonyms Examples Word Origin

## adjective

1. being essential, indispensable, or requisite:
   *"a necessary part of the motor."*

2. happening or existing by necessity:
   *"a necessary change in our plans."*

3. acting or proceeding from compulsion or necessity; not free; involuntary:
   *"a necessary agent."*

4. *Logic.*
   a. (of a proposition) such that a denial of it involves a self-contradiction.
   b. (of an inference or argument) such that its conclusion cannot be false if its supporting premises are true.
   c. (of a condition) such that it must exist if a given event is to occur or a given thing is to exist.
   Compare sufficient (http://dictionary.reference.com/browse/sufficient) (def 2).

## noun, plural **necessaries.**

5. something necessary or requisite; necessity (http://dictionary.reference.com/browse/necessity).

6. **necessaries,** *Law.* food, clothing, etc., required by a dependent or incompetent and varying with his or her social or economic position or that of the person upon whom he or she is dependent.

7. *Chiefly New England.* a privy or toilet.

# TAB 21

**Her Majesty The Queen** *Appellant*

*v.*

**J.-L.J.** *Respondent*

INDEXED AS: R. *v.* J.-L.J.

**Neutral citation: 2000 SCC 51.**

File No.: 26830.

1999: December 10; 2000: November 9.

Present: L'Heureux-Dubé, McLachlin, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Evidence — Expert evidence — Admissibility — Mohan criteria — Accused charged with sexual assaults on two young male children — Expert witness testifying that accused's personality incompatible with any predisposition to commit such offences — Whether trial judge erred in excluding expert evidence.*

The accused was charged with a series of sexual assaults on two young male children. He tendered the evidence of a psychiatrist to establish that in all probability a serious sexual deviant had inflicted the abuse, including anal intercourse, and no such deviant personality traits were disclosed by the accused in various tests including penile plethysmography. After a *voir dire*, the trial judge excluded the expert evidence because it purported to show only lack of general disposition and was not saved by the "distinctive group" exception recognized in *Mohan*. The accused was convicted. A majority of the Court of Appeal allowed the accused's appeal and ordered a new trial on the basis that the expert evidence was wrongly excluded.

*Held*: The appeal should be allowed and the conviction restored.

The trial judge's discharge of his gatekeeper function in the evaluation of the demands of a full and fair trial record, while avoiding distortions of the fact-finding

**Sa Majesté la Reine** *Appelante*

*c.*

**J.-L.J.** *Intimé*

RÉPERTORIÉ: R. *c.* J.-L.J.

**Référence neutre: 2000 CSC 51.**

N° du greffe: 26830.

1999: 10 décembre; 2000: 9 novembre.

Présents: Les juges L'Heureux-Dubé, McLachlin, Iacobucci, Major, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

*Droit criminel — Preuve — Preuve d'expert — Admissibilité — Critères de l'arrêt Mohan — Accusé inculpé d'avoir agressé sexuellement deux garçonnets — Expert témoignant que la personnalité de l'accusé ne permet pas de conclure qu'il est prédisposé à commettre de telles infractions — Le juge du procès a-t-il commis une erreur en excluant la preuve d'expert?*

L'accusé a été inculpé d'avoir commis une série d'agressions sexuelles sur deux garçonnets. Il a fait témoigner un psychiatre dans le but d'établir que, selon toute probabilité, l'auteur des mauvais traitements qui comprenaient des relations sexuelles anales était une personne atteinte d'une déviance sexuelle grave, et que divers tests administrés à l'accusé, dont une pléthysmographie pénienne, ne révélaient aucun trait de personnalité déviant de la sorte. À la suite d'un voir-dire, le juge du procès a exclu la preuve d'expert pour le motif qu'elle paraissait démontrer seulement une absence de prédisposition générale disposition et n'était pas sauvegardée par l'exception du «groupe distinctif» reconnue dans l'arrêt *Mohan*. L'accusé a été déclaré coupable. La Cour d'appel à la majorité a accueilli l'appel de l'accusé et ordonné la tenue d'un nouveau procès pour le motif que la preuve d'expert avait été exclue à tort.

*Arrêt*: Le pourvoi est accueilli et la déclaration de culpabilité est rétablie.

Le fait que le juge du procès a évité que la recherche des faits soit faussée par la présentation d'un témoignage d'expert inapproprié, en exerçant sa fonction de

exercise through the introduction of inappropriate expert testimony, deserves a high degree of respect. In this case, the trial judge was not persuaded that the *Mohan* requirements had been met.

Novel science is subject to "special scrutiny". In this case the psychiatrist was a pioneer in Canada in trying to use the penile plethysmograph, previously recognized as a therapeutic tool, as a forensic tool. Moreover, if expert evidence were accepted that the offence was probably committed by a member of a "distinctive group" from which the accused is excluded, it would be a short step to the conclusion on the ultimate issue of guilt or innocence. This was another reason for special scrutiny.

The "distinctive group" exception sought to be applied here requires that it be shown that the crime could only, or would only, be committed by a person having distinctive personality traits that the accused does not possess. The personality profile of the perpetrator group must identify truly distinctive psychological elements that were in all probability present and operating in the perpetrator at the time of the offence. The *Mohan* requirement that this profile be "standard" was to ensure that it is not put together on an *ad hoc* basis for the purpose of a particular case. Beyond that, the issue whether the "profile" is sufficient depends on the expert's ability to identify and describe with workable precision what exactly distinguishes the distinctive or deviant perpetrator from other people and on what basis the accused can be excluded. The expert evidence tendered in this case was unsatisfactory on both points. The definition of the "distinctive" group of individuals with a propensity to commit the "distinctive crime" was vague. While the reference in *Mohan* to a "standard profile" should not be taken to require an exhaustive inventory of personality traits, the profile must confine the class to useful proportions. Furthermore, the witness did not satisfy the trial judge that the underlying principles and methodology of the tests administered to the accused were reliable and, importantly, applicable. Even giving a loose interpretation to the need for a "standard profile", and passing over the doubts that only a pedophile would be capable of the offence, the evidence of the error rate in the tests administered to the accused was problematic. The possibility that such evidence would distort the fact-finding process was very real. Consideration of the cost-benefit analysis supports the trial judge's conclusion that the testimony offered as many problems as it did solutions, and it was therefore

gardien dans l'évaluation des exigences de procès juste et équitable, mérite beaucoup de respect. Dans la présente affaire, le juge du procès n'était pas convaincu que les exigences de l'arrêt *Mohan* étaient respectées.

Une nouvelle théorie ou technique scientifique doit être «soigneusement examinée». En l'espèce, le psychiatre a fait œuvre de pionnier au Canada en essayant d'utiliser, en tant qu'outil médicolégal, la pléthysmographie pénienne auparavant reconnue comme étant un outil thérapeutique. De plus, si on acceptait une preuve d'expert que l'infraction a probablement été commise par un membre d'un «groupe distinctif» dont l'accusé est exclu, on serait très près de la conclusion sur la question fondamentale de la culpabilité ou de l'innocence. Cela justifiait d'autant plus un examen minutieux.

L'exception du «groupe distinctif» que l'on cherche à appliquer dans la présente affaire exige qu'il soit démontré que le crime ne serait ou ne pourrait être commis que par une personne ayant des traits de personnalité distinctifs que l'accusé ne possède pas. Le profil de personnalité du groupe auquel appartient l'auteur de l'infraction doit relever des éléments psychologiques véritablement distinctifs qui, selon toute probabilité, étaient présents et en action chez ce dernier au moment de la perpétration de l'infraction. L'exigence de l'arrêt *Mohan* que ce profil soit un profil «type» avait pour objet d'éviter qu'il soit établi de manière ponctuelle en fonction de chaque cas particulier. En outre, la réponse à la question de savoir si le «profil» est suffisant dépend de la capacité de l'expert de déterminer et décrire avec une précision réaliste ce qui, au juste, fait que l'auteur distinctif ou déviant du crime diffère des autres personnes, et du motif pour lequel l'accusé peut être exclu. La preuve d'expert qui a été produite en l'espèce était insuffisante à ces deux égards. La définition du groupe «distinctif» de personnes qui ont une propension à commettre ce «crime distinctif» était vague. Même si la mention d'un «profil type» dans l'arrêt *Mohan* ne devrait pas être interprétée comme exigeant un inventaire exhaustif des traits de personnalité, le profil doit ramener la catégorie à des proportions utiles. En outre, le témoin n'a pas convaincu le juge du procès que les principes et la méthode qui sous-tendent les tests administrés à l'accusé étaient fiables et, qui plus est, applicables. Même en donnant une interprétation large à la nécessité d'un «profil type» et en faisant abstraction des doutes que seul un pédophile serait capable de commettre l'infraction en cause, la preuve du taux d'erreur des tests administrés à l'accusé était problématique. La possibilité qu'une telle preuve fausse le processus de

within his discretion to exclude it. The majority of the Court of Appeal erred in interfering with the exercise of that discretion.

recherche des faits était très réelle. La prise en considération de l'analyse du coût et des bénéfices appuie la conclusion du juge du procès que ce témoignage a apporté autant de problèmes que de solutions, et le juge avait donc le pouvoir discrétionnaire de l'exclure. La Cour d'appel à la majorité a commis une erreur en intervenant dans l'exercice de ce pouvoir discrétionnaire.

### Cases Cited

**Applied:** *R. v. Mohan*, [1994] 2 S.C.R. 9; **referred to:** *R. v. Garfinkle* (1992), 15 C.R. (4th) 254; *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, aff'd [1977] 2 S.C.R. 824; *R. v. Lupien*, [1970] S.C.R. 263; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385; *Frye v. United States*, 293 F. 1013 (1923); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Protection de la jeunesse — 539*, [1992] R.J.Q. 1144; *R. c. Blondin*, [1996] Q.J. No. 3605 (QL); *People v. John W.*, 185 Cal.App.3d 801 (1986); *Gentry v. State*, 443 S.E.2d 667 (1994); *United States v. Powers*, 59 F.3d 1460 (1995); *State v. Spencer*, 459 S.E.2d 812 (1995); *R. v. Pascoe* (1997), 5 C.R. (5th) 341; *R. v. B.L.*, [1988] O.J. No. 2522 (QL); *R. v. G. (J.R.)* (1998), 17 C.R. (5th) 399; *R. v. Taillefer* (1995), 100 C.C.C. (3d) 1; *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530; *R. v. K.B.* (1999), 176 N.S.R. (2d) 283; *R. v. Malbœuf*, [1997] O.J. No. 1398 (QL), leave to appeal refused, [1998] 3 S.C.R. vii; *R. v. Perlett*, [1999] O.J. No. 1695 (QL); *R. v. S. (J.T.)* (1996), 47 C.R. (4th) 240; *R. v. Dowd* (1997), 120 C.C.C. (3d) 360; *Davie v. Magistrates of Edinburgh*, [1953] S.C. 34; *R. v. Marquard*, [1993] 4 S.C.R. 223.

### Jurisprudence

**Arrêt appliqué:** *R. c. Mohan*, [1994] 2 R.C.S. 9; **arrêts mentionnés:** *R. c. Garfinkle* (1992), 15 C.R. (4th) 254; *R. c. Béland*, [1987] 2 R.C.S. 398; *R. c. McIntosh* (1997), 117 C.C.C. (3d) 385; *R. c. Seaboyer*, [1991] 2 R.C.S. 577; *Kelliher (Village of) c. Smith*, [1931] R.C.S. 672; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. McMillan* (1975), 23 C.C.C. (2d) 160, conf. par [1977] 2 R.C.S. 824; *R. c. Lupien*, [1970] R.C.S. 263; *R. c. Robertson* (1975), 21 C.C.C. (2d) 385; *Frye c. United States*, 293 F. 1013 (1923); *Daubert c. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Protection de la jeunesse — 539*, [1992] R.J.Q. 1144; *R. c. Blondin*, [1996] A.Q. nº 3605 (QL); *People c. John W.*, 185 Cal.App.3d 801 (1986); *Gentry c. State*, 443 S.E.2d 667 (1994); *United States c. Powers*, 59 F.3d 1460 (1995); *State c. Spencer*, 459 S.E.2d 812 (1995); *R. c. Pascoe* (1997), 5 C.R. (5th) 341; *R. c. B.L.*, [1988] O.J. No. 2522 (QL); *R. c. G. (J.R.)* (1998), 17 C.R. (5th) 399; *R. c. Taillefer* (1995), 40 C.R. (4th) 287; *R. c. B. (S.C.)* (1997), 119 C.C.C. (3d) 530; *R. c. K.B.* (1999), 176 N.S.R. (2d) 283; *R. c. Malbœuf*, [1997] O.J. No. 1398 (QL), autorisation de pourvoi refusée, [1998] 3 R.C.S. vii; *R. c. Perlett*, [1999] O.J. No. 1695 (QL); *R. c. S. (J.T.)* (1996), 47 C.R. (4th) 240; *R. c. Dowd* (1997), 120 C.C.C. (3d) 360; *Davie c. Magistrates of Edinburgh*, [1953] S.C. 34; *R. c. Marquard*, [1993] 4 R.C.S. 223.

### Statutes and Regulations Cited

*Criminal Code*, R.S.C., 1985, c. C-46, ss. 152 [rep. & sub. c. 19 (3rd Supp.), s. 1], 159(1) [*idem*, s. 3].

### Lois et règlements cités

*Code criminel*, L.R.C. (1985), ch. C-46, art. 152 [abr. & rempl. ch. 19 (3e suppl.), art. 1], 159(1) [*idem*, art. 3].

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Mewett, Alan W. «Character as a Fact in Issue in Criminal Cases» (1984-85), 27 *Crim. L.Q.* 29.

be filled in with elements that do not serve to distinguish the perpetrator is not fatal to acceptance of the evidence. While the trial judge was somewhat cryptic in his reasons on this point, it seems to me his decision is consistent with this analysis.

45 Fish J.A. pointed out in the court below that Sopinka J., in *Mohan*, *supra*, had cited *Garfinkle*, *supra*, where the Quebec Court of Appeal had allowed expert psychiatric evidence that pedophilia is "abnormal" and "that Garfinkle does not have such a disposition". While the "distinctive offence" exception recognized in *Garfinkle* was affirmed in *Mohan*, *Garfinkle* itself was decided without the benefit of the elaboration of the "gatekeeper" function developed in *Mohan*. In *Mohan* itself, at p. 38, the exclusory evidence relating to pedophilia was ruled inadmissible because

> there was no material in the record to support a finding that the profile of a pedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges.

Each case turns on its facts. The conclusion of the *Garfinkle* trial judge, affirmed by the Quebec Court of Appeal, that in the circumstances there presented the evidence of Dr. Beltrami was probative and its benefit outweighed the cost, did not bind the trial judge on the facts of this case, who reached a contrary conclusion on the evidence presented in the *voir dire*.

5. *A Properly Qualified Expert*

46 Dr. Édouard Beltrami was accepted as qualified in the fields of psychiatry, sexology and physiology. It was within his expertise to give opinion evidence about the various tests administered under his supervision and his interpretation of the results.

6. *Relevance of the Proposed Testimony*

47 Evidence is relevant "where it has some tendency as a matter of logic and human experience

personnalité ne puisse être complété au moyen d'éléments qui ne servent pas à distinguer l'auteur des autres personnes n'est pas fatal pour ce qui est d'accepter la preuve. Bien que le juge du procès ait été quelque peu énigmatique dans ses motifs sur ce point, il me semble que sa décision est conforme à la présente analyse.

Le juge Fish de la Cour d'appel a souligné que, dans l'arrêt *Mohan*, précité, le juge Sopinka avait cité l'arrêt *Garfinkle*, précité, dans lequel la Cour d'appel du Québec avait admis une preuve d'expert en psychiatrie que la pédophilie est [TRADUCTION] «anormale» et «que Garfinkle n'a pas une telle prédisposition». Bien que l'exception de l'«infraction distinctive» reconnue dans l'arrêt *Garfinkle* ait été confirmée dans *Mohan*, l'arrêt *Garfinkle* a été rendu en l'absence de la fonction de «gardien» établie dans l'arrêt *Mohan*. Dans l'arrêt *Mohan* lui-même, à la p. 38, la preuve d'exclusion relative à la pédophilie a été jugée inadmissible car

> aucun document dans le dossier ne permettait de conclure que le profil du pédophile ou du psychopathe a été normalisé au point où on pourrait soutenir qu'il correspond au profil présumé du délinquant décrit dans les accusations.

Chaque cas est un cas d'espèce. La conclusion du juge du procès dans *Garfinkle*, confirmée par la Cour d'appel du Québec, que, dans les circonstances de cette affaire, la preuve du Dr Beltrami était probante et ses bénéfices l'emportaient sur son coût ne liait le juge du procès en l'espèce, qui a tiré une conclusion contraire fondée sur la preuve présentée lors du voir-dire.

5. *Un expert compétent*

On a reconnu la compétence du Dr Édouard Beltrami dans les domaines de la psychiatrie, de la sexologie et de la physiologie. Il était compétent pour offrir un témoignage d'opinion concernant les divers tests administrés sous sa surveillance et son interprétation des résultats.

6. *Pertinence du témoignage proposé*

Une preuve est pertinente [TRADUCTION] «lorsque, selon la logique et l'expérience humaine, elle

# TAB 22

# THE PUBLIC UTILITIES BOARD

## RULES OF PRACTICE AND PROCEDURE

### Title

1. These Rules may be cited as the Rules of Practice.

### Definition

2. In these Rules:

a) "ACT" means *The Public Utilities Board Act*, R.S.M. 1987 Chapter P 280 as amended from time to time;

b) "AFFIDAVIT" means either a sworn or affirmed statement of facts, based on personal knowledge or on information and belief, and in writing, made voluntarily before an officer having authority to administer such oath or affirmation;

c) "APPLICANT" means a party who has filed an application with the Board under the Act or its Regulations;

d) "APPLICATION" means a written request to the Board to exercise its statutory power in respect of matters referred to in the application;

e) "BOARD" means The Public Utilities Board and where the context requires, includes a panel of the Board;

f) "COMPLAINT" means a written request to the Board to exercise its statutory power in respect of matters referred to in the complaint;

g) "DOCUMENTS" include written documentation, films, photographs, charts, maps, graphs, plans, surveys, books of account, transcripts, videotapes, audio tapes, and information stored by means of an electronic storage and retrieval system;

h) "ELECTRONIC HEARING" means a hearing held by conference telephone or some other form of electronic technology allowing persons to communicate with one another;

i) "HEARING" means a proceeding before the Board wherein a party or parties provide submissions to the Board which submissions may, in the Board's

11. (1) To facilitate the hearing process a pre-hearing conference may be held to consider:

a) a statement of the issues;

b) the necessity or desirability of amending an application for the purpose of clarification, amplification or limitation;

c) the setting of dates for the orderly exchange of documents and information requests;

d) the procedures to be adopted in the proceeding;

e) any other matters that may aid in the simplification and disposition of the proceeding; and

f) registration of Interveners, where possible.

(2) Where, in the opinion of the Board, the amount, level of detail and complexity of material so warrants, the Board may direct the parties to participate in a non-evidentiary technical conference for the purpose of considering:

a) a tutorial presentation for interested parties;

b) a discussion or workshop style conference to gain an understanding or clarification on a matter; or

c) any other presentation or conference style arrangement that will assist the understanding of the Board and interested parties.

**Production of Documents**

12. (1) Where, in an application, intervention, motion or response to an information request, a party refers to a document which the party intends to rely on in the proceeding, that party shall attach a copy of that document to its evidence.

(2) The Board, on its own initiative or upon motion by any party may order any person or party in a proceeding to produce any document relating to the proceeding.

(3) Any party who fails to comply with an order pursuant to subsection (2) shall be deemed to be in breach of the said order.

**Confidentiality**

13. (1) Where, a document is filed with the Board by a party in relation to any proceeding, the Board shall, subject to subsection (2), place the document on the public record.

(2) The Board may receive information in confidence on any terms it considers appropriate in the public interest,

a) if the Board is of the opinion that disclosure of the information could reasonably be expected

(i) to result in undue financial loss or gain to a person directly or indirectly affected by the proceeding; or

(ii) to harm significantly that person's competitive position.

or

b) if

(i) the information is personal, financial, commercial, scientific or technical in nature; or

(ii) the information has been consistently treated as confidential by a person directly affected by the proceeding; and

(iii) the Board considers that the person's interest in confidentiality outweighs the public interest in the disclosure of the information.

(3) Where disclosure of any document is refused due to a claim for confidentiality and a claim for public disclosure of such documents has been made, the Board shall hear such claim on a motion made under Rule 22, and may

a) order the document be placed on the public record, subject to Subsection13(5);

b) order the document not be placed on the public record, with such conditions on access imposed as the Board considers appropriate;

c) order an abridged version of the document to be placed on the public record; or

d) make any other order the Board finds to be in the public interest.

(4) For purposes of hearing a motion in respect of a disputed claim under Subsection (3), the Board may examine the document or other evidence in question to ascertain whether or not the claim for confidentiality or the claim for public disclosure will be sustained.

(5) Where the Board has decided to place on the public record any part of a document that was filed in confidence in accordance with Subsection 13(2) and 13(3), the party who filed the document shall be given an opportunity to request that it be withdrawn prior to its placement on the public record.

## Information Requests

14. (1) Where, in any proceeding, the Board permits information requests to be directed to a party for the purpose of a satisfactory understanding of the matters to be considered, such information requests shall be identified by the inquiring party's designated prefix and be:

a) addressed to the party from whom the response is sought;

b) numbered consecutively in respect of each item of information requested;

c) relevant to the proceeding; and

d) served, where the Board has directed a time limit, within the time limit directed by the Board.

(2) A copy of any information request directed to a party pursuant to Subsection (1) shall be filed with the Secretary and served on all interested parties to the proceeding.

## Response to Information Requests

15. (1) Subject to Subsection (2), where an information request has been directed to a party and served on that party in accordance with the Board's directions, the party shall:

a) provide a full and adequate response to each information request on a separate page or pages, or, by agreement between the parties by electronic means; and

b) file a written copy of the responses with the Secretary and serve a written or electronic copy of the responses on all parties to the proceedings as directed by the Board.

(2) Where there is a dispute with respect to the adequacy of a response to an information request, the Board may orally or in writing direct all parties:

a) to appear before the Board or a member of the Board at a specified time and place for a conference; or

b) to submit in writing their position and views on the matter for the purpose of assisting the Board.

16. A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;

b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response that the party considers would be of assistance to the party making the information requests;

c) where the party contends that the information sought is of a confidential nature, setting out the reasons why it is considered confidential and any harm that would be caused by making it public; or

d) otherwise explaining why such a response cannot be given.

## Evidence

17. (1) The Board may receive evidence by:

a) sworn testimony or testimony solemnly affirmed; or

b) the report of any person directed by the Board to so report; or

c) such other manner as may be deemed appropriate by the Board.

(2) Witnesses at a hearing shall be examined orally under oath or affirmation unless otherwise directed by the Board.