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March 17, 2017

BY ELECTRONIC FILING

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

Re: Application for Reconsideration and Variance of Order G-199-16, dated December 29, 2016, on FortisBC Inc.'s Net Metering Program Tariff Update Application

We are counsel for FortisBC Inc. (**FBC**).

Pursuant to section 99 of the *Utilities Commission Act*, FBC is filing the enclosed application (the **Reconsideration Application**) for reconsideration and variance of British Columbia Utilities Commission (**BCUC** or the **Commission**) Order G-199-16, dated December 29, 2016, on FBC's Net Metering Program Tariff Update Application (Commission Project No. 3698875).

Five hard copies of the enclosed Reconsideration Application will follow by courier.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per:

Nicholas T. Hooge

NTH/bd
Enclosure
c.c.: Registered Interveners (email only)
Client

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF
the *Utilities Commission Act*, R.S.B.C. 1996, chapter 473

and

FortisBC Inc. Application for Reconsideration and Variance of
Commission Order G-199-16
on the FortisBC Inc. Net Metering Tariff Update Application

FORTISBC INC. RECONSIDERATION APPLICATION – PHASE 1

March 17, 2017

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I. INTRODUCTION

1. FortisBC Inc. (**FBC**) files this application (the **Reconsideration Application**) pursuant to section 99 of the *Utilities Commission Act* (***UCA*)** for reconsideration and variance of British Columbia Utilities Commission (**BCUC** or the **Commission**) Order G-199-16, dated December 29, 2016 on FBC's Net Metering Program Tariff Update Application (the **Application**).

2. Specifically, if the Reconsideration Application proceeds to a second phase, FBC will be seeking to vary Order G-199-16 in the following respects:

(a) FBC not be directed to submit to the Commission changes to the Net Metering (**NM**) Tariff, Rate Schedule (**RS**) 95, which require that RS 95 customers not be removed from the NM Program solely on the basis of producing net excess generation (**NEG**) on an annual basis;

(b) The kilowatt hour (**kWh**) bank described in Section 5 of the Application to carry forward NEG accumulated in an NM customer's billing period to offset consumption in a future billing period, with an annual settlement for remaining unused NEG, be approved for implementation and the terms of RS 95 be amended accordingly; and

(c) The terms of RS 95 be further amended such that NM customers are compensated for any positive kWh balance remaining in the kWh bank at the end of the annual period using the British Columbia Hydro and Power Authority (**BC Hydro**) RS 3808 Tranche 1 rate.

3. FBC does not seek reconsideration and variation of Order G-199-16 in any other respect.

4. FBC respectfully submits that the Commission panel majority's decision (the **Majority Decision**) discloses material errors of fact and law that justify variation of Order G-199-16 as described above. The consequences of these errors are that:

(a) FBC's pre-existing right to remove customers from RS 95 if they produce consistent annual NEG has been abrogated, on the Commission's own motion, with the result that FBC now has no ability to prevent existing customers with high NEG production based on their current generation size from maximizing annual NEG, contrary to the intent of

the NM program. The amendments directed by the Commission panel majority effectively entrench a rate preference for this group of pre-existing NM customers (see pages 7-15, below);

(b) the kWh bank proposal was not reviewed on its own merits, but was treated erroneously as being only a "mechanism to implement FBC's proposed" NEG price change, despite the kWh bank proposal receiving broad support from most Interveners as well as the dissenting panel member, despite there being evidence that over 90% of residential NM customers would benefit monetarily from the proposal, and despite every other NM program in Canada using some form of kWh bank mechanism (see pages 15-19, below); and

(c) the panel majority has approved, without considering all relevant factors, NEG pricing that overcompensates NM customers without any valid justification and at the expense of other FBC rate payers. Further, the NEG compensation price the majority approved can and does result in FBC receiving less than a fair rate of return from residential NM customers when they are credited for NEG at Tier 2 rates in particular billing periods but only consume electricity at a Tier 1 level or not at all. The panel majority has therefore approved unjust and unreasonable rates contrary to the *UCA* (see pages 19-29, below).

5. The following sections of this Reconsideration Application set out:

(a) the applicable procedure on an application for reconsideration;

(b) a summary of FBC's grounds for reconsideration;

(c) a detailed discussion of each of the grounds for reconsideration; and

(d) FBC's position on whether the Commission should hear new evidence at the second phase of the reconsideration process.

II. PROCEDURE ON RECONSIDERATION

6. Section 99 of the *UCA* provides that: "The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

7. As described in *A Participant's Guide to the B.C. Utilities Commission* (July 2002 Rev.), an application for reconsideration proceeds in two phases. The first phase is an "initial screening phase", where the applicant's burden is only to establish a "*prima facie* case sufficient to warrant full consideration by the Commission". The preliminary examination at the first phase is assessed in light of some or all of the following questions:

(a) Should there be reconsideration by the Commission?

(b) If there is to be reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?

(c) If there is to be reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

8. The Commission generally applies the following criteria to determine whether or not a reasonable basis exists for reconsideration:

(a) the Commission has made an error in fact or law;

(b) there has been a fundamental change in facts or circumstances since the decision;

(c) a basic principle has not been raised in the original proceedings;

(d) a new principle has arisen as a result of the decision; or

(e) there is other just cause to reconsider the decision.[1]

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[1] BCUC Order G-173-14 and Decision, dated November 12, 2014, FortisBC Energy Inc. and FortisBC Inc. Multi-Year Performance Based Ratemaking Plans for 2014 through 2019 Application for Reconsideration and Variance, p. 2

9. FBC's Reconsideration Application is founded on errors of law and fact in Order G-199-16. In such circumstances, the Commission applies the following test to determine whether reconsideration should advance to the second phase:

(a) whether the claim of error is substantiated on a *prima facie* basis; and

(b) whether the error has significant material implications.[2]

10. If the Commission is satisfied that reconsideration is warranted, the proceeding moves to the second phase where evidence (if any) and full argument is heard on the merits of the application and the Commission decides if the original decision should or should not be varied or overturned.

III. SUMMARY OF GROUNDS FOR RECONSIDERATION

11. FBC seeks reconsideration and variance of Order G-199-16 on the grounds that the Commission panel majority made material errors of law and fact in its decision. These errors relate to two broad issues: ***first***, the interpretation of the rights and obligations set out in RS 95 and the panel majority's direction that changes be made to the terms of the NM tariff in respect of customers that consistently produce annual NEG; and, ***second***, the treatment of and compensation rate for NEG.

A. Interpretation of RS 95

12. FBC respectfully submits that the Commission panel majority erred in its interpretation of RS 95 regarding the legal consequences of an NM customer producing consistent annual NEG. This erroneous interpretation led to the majority's direction that FBC propose an amendment to the tariff purportedly clarifying that customers cannot be removed from the NM program solely for producing annual NEG.[3]

13. The Commission panel majority's errors in interpretation of RS 95, which appear to underpin this portion of Order G-199-16, included the following:

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[2] Ibid.
[3] Majority Decision, p. 13

(a) suggesting that the Commission panel that originally approved RS 95 in 2009, pursuant to Order G-92-09 (the **2009 NM Decision**) did not share the same intent as FBC regarding customer eligibility criteria for the NM program;[4]

(b) failing to give proper consideration to the true intent and purpose of the NM program, as reflected in the 2009 NM Decision, in determining that production of consistent annual NEG does not make customers ineligible for the NM program and subject to removal from RS 95;

(c) failing to give proper consideration to the whole of FBC's Electric Tariff and Rate Schedules in its interpretation of the legal content of the terms of RS 95, which, had they been considered, supported the conclusion that consistent producers of annual NEG are ineligible for the NM program and subject to discontinuance of service under RS 95.

14. The foregoing errors of law in the interpretation of RS 95 led the panel majority to the erroneous conclusion that "FBC does not have this right [i.e. to remove a customer from the NM program if the customer becomes a consistent producer of Annual NEG] under the current RS 95, nor should they going forward".[5]

15. These errors in the interpretation of RS 95 undermine the majority's direction that the tariff should be changed to specify that customers cannot be removed from the NM program due to consistent production of annual NEG. In making this direction, the panel majority also failed to recognize that the 2009 NM Decision had already decided that the terms of RS 95 – a proper interpretation of which does give FBC the right to remove customers for persistent NEG – were in the public interest.

16. FBC stresses that being "removed" from RS 95 in this context and the right of "removal" it asserts under RS 95 do not mean that customers would be left without utility service or that they would be unable to offset their electricity consumption using self-generation. In response to a BCUC information request (**IR**) that the panel majority appears not to have taken into account

[4] Majority Decision, p. 8
[5] Majority Decision, p. 13-14 (underlining added)

in its reasoning, FBC confirmed that a customer that is removed from the NM program in these circumstances "could continue to be interconnected with the FBC system and would continue to receive the primary benefit of the Net Metering Program in offsetting personal consumption, but would not be compensated for net-generation that exceeds net-consumption in a given month".[6]

17. FBC submits that reconsideration of the aforesaid Commission direction is warranted, which reconsideration should be based on a correct interpretation of RS 95 and full appreciation of the 2009 NM Decision.

B. Treatment of NEG

18. The Commission panel majority also committed errors of law and fact in its determinations regarding the treatment of NEG; in particular, its rejection of the proposed kWh bank and its rejection of a change to the compensation rate for NEG to the BC Hydro RS 3808 Tranche 1 rate. These errors include the following:

(a) treating the kWh bank solely as a "mechanism to implement FBC's proposed pricing method"[7] and failing to consider the benefits of the kWh bank proposal on their own merits or for the purposes of determining whether a change to the NEG compensation rate was warranted;

(b) relying on the 2009 NM Decision as a precedent regarding compensation for NEG and applying a standard of whether the circumstances have changed sufficiently to warrant a departure from the prior decision, rather than giving full and independent consideration to the merits of FBC's proposed treatment of NEG. The panel majority's approach is, *inter alia*, contrary to s. 75 of the *UCA*; and

(c) requiring FBC to continue to compensate residential NM customers for NEG at the equivalent of tiered residential conservation rates (**RCR**), but on the basis of a policy justification that is only valid in the circumstances of flat retail rates that no longer apply. Maintaining the principle that NEG compensation rates must match retail rates

[6] BCUC IR 1.5.6 (Ex. B-4, p. 14, underlining added); see also BCUC IR 2.12.4 (Ex. B-12, p. 3)
[7] Majority Decision, p. 20

even under RCR also results in FBC overcompensating NM customers who produce NEG at a Tier 2 level, but are only charged for consumption at the Tier 1 level (or not at all) in certain billing periods. This devalues the rates FBC receives from these NM customers, which in turn means that FBC is receiving less than fair and reasonable compensation for the services provided contrary to s. 59(5) of the *UCA*.

19. Each of these errors is outlined in more detail below. FBC respectfully submits that any one of them would independently justify the Commission's reconsideration of FBC's proposed treatment of NEG.

IV. ERRORS IN INTERPRETATION OF RS 95

A. Summary of FBC's Position on its Rights Under RS 95 and the Majority's Determination

20. As noted, the Commission panel majority directed FBC to propose changes to RS 95 that would purportedly clarify that existing customers cannot be removed from the NM program solely on the basis of producing annual NEG. This direction was effectively on the panel majority's own motion and in response to FBC's stated position regarding its rights under RS 95 in response to IRs. FBC's position was that:

> Under the current program structure, in the event that a system was properly sized when installed subsequently started to produce NEG on an annual basis, the Company would reserve its right to remove the customer from the NM Program as it would no longer be in compliance with either the Eligibility criteria contained in the Tariff or the objective of the Program.
>
> Such a customer could continue to be interconnected with the FBC system and would continue to receive the primary benefit of the Net Metering Program in offsetting personal consumption, but would not be compensated for net-generation that exceeds net-consumption in a given month.[8]

[8] BCUC IR 1.5.6 (Ex. B-4, p. 14, underlining added); see also BCUC IR 2.12.4 (Ex. B-12, p. 3)

21. The Commission panel majority determined that FBC does not have the right asserted in this IR response under the existing terms of RS 95. The majority's determination in this regard was as follows:

> FBC argues that it currently has the right (whether or not they would choose to exercise it) to remove a customer from the Program if the customer becomes a consistent producer of Annual NEG. The Panel finds to the contrary, that FBC does not have this right under the current RS 95 tariff, nor should they going forward.[9]

22. The panel majority then went on to provide "two fundamental reasons why the right to remove a participant is not in the public interest".[10] The Majority Decision did not, however, provide an explanation for why it interpreted the existing RS 95 as not including the right FBC asserted.

23. RS 95 is a legal instrument that forms part of the contract for utility services that every NM customer enters into with FBC.[11] As such, its meaning must be determined in accordance with legal principles applicable to the interpretation of contracts and other legal instruments. Notably, the Majority Decision did not include any discussion of or reasons for disagreeing with the interpretation of RS 95 that FBC provided in response to the Commission's own IR.[12] The Commission panel majority did not, on the face of the record, conduct a legal analysis of the correct interpretation of the tariff in concluding that FBC does not have the right to remove customers from RS 95 if they consistently produce annual NEG. FBC submits that, had such an analysis been performed, the Commission would have concluded FBC does have this legal right.

24. Two fundamental principles of legal interpretation support this position:

(a) first, the terms of RS 95 must be interpreted in light of the "factual matrix" at the time of its enactment. This includes the background purpose behind the NM program, which

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[9] Majority Decision, p. 13-14
[10] *Ibid.*, p. 14
[11] FBC Electric Tariff B.C.U.C. No. 2 For Service in the West Kootenay and Okanagan Areas at TC1 (First Revision, dated November 1, 2012); see also BCUC IR 2.15.1 (Ex. B-12, p. 10)
[12] BCUC IR 2.12.4 (Ex. B-12, p. 3)

supports FBC's right to discontinue services under RS 95 if customers no longer satisfy the eligibility criteria; and

(b) second, the terms of RS 95 must be interpreted harmoniously with the rest of the legal instrument, which includes the balance of the general terms and conditions of FBC's Electric Tariff. Again, these provisions support FBC's right of removal from the NM program.

B. Intent of the NM Program & the Factual Matrix

25. The factual matrix is a flexible concept in legal interpretation and is necessarily contextual. In general, it encapsulates the "background" or "object and purpose" of the contract or other legal instrument.[13]

26. The factual matrix is an essential element of interpretation in all cases, even when there is no apparent ambiguity in the meaning of the written text of the agreement or instrument.[14] The BC Court of Appeal has held that:

> Just as in statutory interpretation, so also in contract interpretation. The fact that the section or clause seems to have a plain enough meaning when viewed in isolation does not preclude, but indeed requires, an examination of the whole text of the statute or agreement, and a consideration of the section or clause in their place in the whole text and in the factual matrix in which they were intended to operate. That process is required in every case of interpretation of either a statute or an agreement.[15]

27. The panel majority did consider the surrounding intent behind the NM program (although not expressly for the purposes of determining the content of FBC's legal right under RS 95) and the participant eligibility provisions of RS 95; however, its analysis of this issue was in error. The panel majority agreed that FBC's intent was that the program would only be used for customers' own consumption, but then questioned whether "FBC's intent is necessarily the same

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[13] G. Hall, Canadian Contractual Interpretation Law, 2nd ed. (2012) at p. 25-26; Beal's Cardinal Rules of Legal Interpretation, 3rd ed. (1924) at p. 77
[14] Hall, *ibid.*, p. 21
[15] *Jacobsen v. Bergman*, 2002 BCCA 102 at para. 4

thing as the Commission's intent in approving the RS 95 tariff".[16] This statement overlooks the actual order and decision the Commission made in the 2009 NM Decision. In paragraph 1 of Order G-92-09, the Commission stated its approval of "the FortisBC Net Metering program as proposed in the Application ... with the modifications described in the Reasons for Decision ..." (underlining added). The Reasons for Decision then commence by stating that "The Commission Panel generally approves the FortisBC Net Metering Tariff Application, as filed".[17] The 2009 NM Decision goes on to describe two required amendments to the draft RS 95 FBC had proposed, though neither relates to NEG.

28. By stating that the NM program and tariff schedule were approved "as proposed in the Application" and "as filed", the 2009 Commission panel indicated itself to be in agreement with FBC's statements regarding the intent of the program and eligibility criteria in the 2009 Application and Submissions. The 2016 Majority Decision rightly concluded that these statements were consistent with FBC's intent that the NM program was not a means for customers to consistently produce NEG for sale to FBC, but the panel majority then erred in distinguishing that from the Commission's intent in approving RS 95.[18]

29. If the 2009 Commission panel had a different understanding of the "intent" of the NM program than what FBC had described in its Application and Submissions (as the 2016 panel majority suggested), then the 2009 panel would not have stated its approval in the terms described above and it would necessarily have explained in the Reasons for Decision how its views regarding customer eligibility differed from what FBC had clearly expressed in its filings.

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[16] Majority Decision, p. 8 (underlining added)
[17] 2009 NM Decision, p. 1 (underlining added)
[18] In addition to the excerpt from the 2009 proceeding cited in the Decision at p. 8, other statements from the 2009 proceeding regarding the intent for program eligibility include the following:

- Application, p. 5: "It is the overriding intent of the program that customers gain the ability to offset their own consumption with a clean and renewable resource. It is not the intent of the program to provide a means for larger scale Independent Power Producers ("IPP") to bring their output to the market" (underlining added).
- FBC Final Submission, para. 18: "Furthermore, any surplus should be a temporary exception since the net metering program is intended only for customers to offset their own consumption. Given the small amount that any surplus could potentially be under the program rules, and the additional administrative requirement that would result, FortisBC does not propose to pay a rate other than the proposed retail" (underlining added).

30. FBC's intent for the NM program as expressed in the 2009 proceeding must have been shared by the Commission panel that originally approved the program. That intention, which is a key component of the factual matrix in these circumstances, is consistent with and supports FBC's right to remove customers who no longer satisfy the program eligibility criteria.

C. The Whole of the Electric Tariff Also Supports FBC's Interpretation

31. Another fundamental principle of legal interpretation is that the words of one provision or part of the agreement or instrument are not to be read in isolation, but should be considered in harmony with the rest of the terms and conditions in the legal instrument.[19] A proper interpretation of RS 95 should also, therefore, take into account the balance of the terms and conditions of FBC's Electric Tariff and Rate Schedules.

32. These include s. 10, addressing customer-owned generation, which provides, *inter alia*, that:

> If at any time the Company's electrical system is adversely affected due to difficulties caused by the Customer's generating facilities, upon oral or written notice being given by the Company to ... the Customer, the Customer shall immediately discontinue parallel operation, and the Company may suspend Service until such time as the difficulties have been remedied to the satisfaction of the Company ...

33. It is plausible that persistent NEG could be considered a "difficulty" that "adversely affects" FBC's electrical system within the meaning of this provision. Section 10 of the Electric Tariff may therefore provide an independent basis for FBC's right to remove persistent producers of NEG from the NM program that was not considered in the Majority Decision. FBC need not rely on s. 10 for that purpose, however. FBC submits that the existence of this provision and the significant discretion it bestows on FBC in respect of its customers' self-generation systems, is consistent with and supportive of the right of removal FBC has specifically asserted under RS 95.

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[19] Hall, id. at p. 15, citing Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] 1 S.C.R. 69 at para. 64; Jacobsen v. Bergman, supra, at paras. 3-4; Beal's Cardinal Rules of Legal Interpretation, supra, at p. 60

34. Another relevant consideration, based on a review of the whole of FBC's Electric Tariff and Rate Schedules, is that there are no provisions that explicitly bestow a right on FBC to "remove" customers from, or discontinue service under, particular rate schedules if the eligibility criteria are no longer satisfied. For example, as FBC pointed out in response to a BCUC IR, eligibility for RS 31 requires a customer to be served at transmission voltage and to have a load in excess of 5,000 kVA.[20] While there is no express provision in RS 31 stating that a customer who drops below the load threshold will be subject to removal from this rate, that is undoubtedly the case. The customer would no longer possess the service characteristics that would make RS 31 applicable and justify the particular charges associated with the rate. Continuing to provide service under the rate schedule for which the customer was not eligible would be a form of rate preference contrary to s. 59 of the *UCA*.

35. In order for the interpretation of RS 95 to be in harmony with the balance of the Electric Tariff and Rate Schedules, FBC must also necessarily have been able to remove customers from the NM program if they no longer satisfy the eligibility criteria. Customers that are not eligible for RS 95 simply have no entitlement to continue to receive service under that rate schedule and FBC has no continuing obligation to provide it. The same is true if customers become ineligible for any other FBC rate schedule.

D. Material Implications of the Contract Interpretation Errors

36. The above described legal errors in the interpretation of RS 95 had material implications for the Commission panel majority's determination that FBC must amend the tariff to make clear that customers cannot be removed for producing consistent annual NEG. Because the majority erroneously concluded that FBC did not have the asserted right under the existing, previously approved terms of RS 95, it approached the issue from the perspective of whether the public interest supported granting FBC a <u>new</u> right of this nature.[21] The burden was thus erroneously placed on FBC to justify an amendment to add a right of removal when, in fact, the proper

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[20] BCUC IR 2.12.4 (Ex. B-10, p. 3)

[21] See Majority Decision, p. 9 ("… with regard to ongoing eligibility in the face of persistent Annual NEG, the propose wording could be seen as conferring rights to FBC <u>that the Panel is not prepared to grant</u>" (underlining added))

framing was whether the public interest necessitated that FBC's existing contractual right under RS 95 should be abrogated by tariff amendment.

37. Full consideration of this issue also required the panel to recognize and address the Commission's previous approval of RS 95 in the 2009 NM Decision. The NM rate schedule was approved pursuant to ss. 59-61 of the *UCA* in that decision. As such, the terms and conditions of RS 95 were, by necessary implication, previously determined to be in the public interest. If, as FBC submits, the existing tariff provisions give it the right to remove customers from RS 95 for producing consistent annual NEG, then that right has already received Commission approval. While the Commission panel hearing the 2016 Application was not bound to follow the 2009 NM Decision as a form of precedent per s. 75 of the *UCA*, the prior approval should form part of the consideration of the present public interest.

38. FBC also notes that at least one of the panel majority's public interest rationales for refusing to endorse FBC's right of removal appears to have overlooked FBC's commitment that NM customers who are removed from RS 95 would still be entitled to offset their own consumption using self-generation.[22] Specifically, the panel majority found that the possibility of exclusion "would likely pose an unacceptable risk to some customers who might otherwise wish to participate in the NM Program. Investment in self-generation capacity has a long-term payback, and hence any uncertainty in the duration of eligibility would be a deterrent to participation (i.e. in making their initial investment)".[23]

39. This public interest rationale is inconsistent with the intention that the NM program be limited, to the greatest extent possible, to off-setting customers' own consumption. The Commission panel majority itself recognized the importance of this principle in approving the addition of clarifying language to the eligibility section of RS 95, which was said to be "within the original intent of the program".[24] On that basis, an NM customer's only reasonable expectation upon joining the program would be to minimize or reduce electricity costs and thereby off-set the initial investment in self-generation. There should be no expectation of using

[22] BCUC IR 1.5.6 (Ex. B-4, p. 14)
[23] Majority Decision, p. 14
[24] Majority Decision, p. 11

the NM program to turn a profit through sales of NEG to FBC and initial investment decisions should not be made on the expectation of receiving regular monetary compensation for NEG. As noted above the "risk" associated with removal is limited to the possibility of not receiving compensation for NEG. This risk could not objectively deter a potential NM customer's investment in self-generation unless the customer assumed a profit margin contrary to the intent of the program.

40. Had the contemplated amendment to RS 95 been addressed in the proper context, the Commission panel majority could well have reached a different conclusion on the appropriateness of the amendment it directed. This direction has significant material implications because it represents a change to the existing rights and obligations in FBC's service agreements with all of its existing NM customers. In addition, the majority's determination regarding FBC's rights under RS 95 creates significant uncertainty about the content of its legal rights in respect of customers on other rate schedules. As discussed above, there are no terms in the Electric Tariff and Rate Schedules that explicitly grant FBC the authority to remove customers from any rate schedule if they no longer meet the eligibility criteria. The Majority Decision could be construed as limiting such rights contrary to FBC's settled expectations and understanding of the operation of its Electric Tariff.

41. FBC's right to remove customers from RS 95 is also an important form of check on the NEG production of existing NM customers. Without the existence of this right, and the concomitant risk to existing NM program participants that their NEG may no longer be compensated in the future, there is effectively no disincentive against existing customers maximizing the NEG produced by their current systems for sale to FBC.

42. The effect of this direction is also to entrench a form of rate preference for the small group of existing NM customers who have the potential to produce annual NEG. Many of these customers, including the largest generators, installed their systems prior to RS 95 being approved in 2009.[25] The Commission's other directions in Order G-199-16 limit the ability for new customers to enter the NM program with over-sized generation systems or for existing customers

[25] BCSEA IR 1.13.2 (Ex. B-6, p. 36)

to increase the size of their generation disporportionatly to their consumption. The 6-8 existing NM program participants that have the highest likelihood of producing annual NEG are now receiving a "privilege" that is not "regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description" contrary to s. 59(2)(b) of the *UCA* and FBC has no ability to limit this preference through its rights under its Electric Tariff.

43. A second phase reconsideration process should be ordered to address these various issues.

V. FAILURE TO GIVE FULL CONSIDERATION TO KWH BANK PROPOSAL

A. Summary of FBC's kWh Bank Proposal

44. As part of its proposed changes to the treatment of NEG under RS 95, FBC's Application sought Commission approval to implement a "NEG carry-forward methodology" described as "a kWh bank that alternately carries NEG forward to offset consumption in a future billing period, or applies previously accumulated NEG in a billing period when net consumption exceeds net generation".[26] FBC's Application noted that based on its review of net metering programs across Canada, all utilities (except for FBC itself) use some form of kWh bank to track excess generation.[27]

45. FBC's evidence and submissions in support of the Application highlighted a number of benefits of the kWh bank proposal:

(a) The annual reconciliation of NEG pursuant to a kWh bank allows customers the benefit of using their net generation during seasons in which generation is higher than consumption to offset consumption in periods where the opposite occurs.[28]

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[26] FBC Application, Ex. B-1, p. 10
[27] FBC Application, Ex. B-1, p. 11
[28] BCUC IR 1.5.3 (Ex. B-4, p. 12)

(b) As a result, a kWh bank smoothes out billing for customers by mitigating circumstances where they pay nothing for electricity during periods of lower demand, but then face higher bills the rest of the year.[29]

(c) A kWh bank also benefits most customers under RCR because unused kWhs that are carried forward to a future billing period may be valued at the higher Tier 2 rate rather than the Tier 1 rate.[30] NM participants would therefore receive maximum value for the generation that is used to offset consumption using a kWh bank.[31]

(d) FBC's analysis of the billing impact for NM participants based on the previous 36 months of consumption and generation showed that a significant majority in the residential class would be better off if FBC's proposed changes to the treatment of NEG were implemented, even with annual NEG being compensated at the BC Hydro RS 3808 rate.[32] Of the 67 residential customers whose accounts were analysed, 40 were better off (60%), 15 had no impact, and only 12 were worse off (18%). The results were even more pronounced when the billing analysis was restricted to the 25 residential customers who had a full 12 months of activity in the NM program (from February 2015 to February 2016); of this group all but two (i.e. 92%) would have received lower total billings if FBC's proposed changes had been in place.[33] These benefits were primarily attributable to the kWh bank's carryover mechanism and the resulting shift of billing from Tier 2 to the lower Tier 1 rate.[34]

46. Most interveners supported the adoption of a kWh bank.[35]

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[29] FBC Reply Submissions, dated September 30, 2016, at para. 9
[30] FBC Final Submissions, dated September 16, 2016, at para. 37
[31] BCUC IR 1.8.1 (Ex. B-5, p. 24)
[32] FBC Letter, dated June 8, 2016, Ex. B-2, p. 3
[33] Application, Ex. B-1, p. 11
[34] BCSEA IR 1.9.6.8 (Ex. B-6, p. 30)
[35] FBC Reply Submissions at para. 5

B. The Majority Erred in Treating the kWh Bank Solely as a Price Adjustment Mechanism

47. In the Majority Decision, FBC's proposed change to the compensation rate paid to its NM customers for NEG was addressed prior to any substantive discussion of the kWh bank proposal.[36] Having determined that no change to the practice of compensating NEG using retail rates was warranted, the panel majority then rejected the proposed creation of a kWh bank in the following brief reasons:

> The Panel has previously determined the existing practice of valuing NEG generated in each billing period at the customer's retail rate should be continued. As a result, there is no need for the development of an energy bank mechanism to implement FBC's proposed pricing method".[37]

48. It was an error of fact for the majority of the Commission panel to conclude that the proposed kWh bank was solely a "mechanism to implement FBC's proposed pricing". As summarized above, the kWh bank proposal had numerous benefits for FBC's customers that are independent of the specific NEG pricing change that FBC also proposed. The fact that all other Canadian utilities use some form of kWh banking mechanism in conjunction with their NM programs[38] demonstrates that there is good reason to use a kWh bank regardless of the rate of compensation a particular jurisdiction decides is appropriate for compensating annual NEG.

49. The kWh bank was not proposed by FBC simply as a means to implement a NEG pricing change. In FBC's submission, the Dissenting Opinion of Commissioner Revel (the **Dissent**) correctly recognized the independent benefits of the proposal. The Dissent would have approved the kWh bank proposal in the following terms:

> I find myself persuaded of the merits of the proposed KWh bank proposal and consider it will serve, very well, the vast majority of the current customers in the NM who produce small amounts of NEG intermittently. I consider that it will improve their positions as it will allow them to carry any NEG forward over a year and receive, potentially, offsetting power at a time when their production may be substantially limited. I note that this

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[36] Majority Decision, p. 14-19
[37] Majority Decision, p. 20 (underlining added)
[38] FBC Application, Ex. B-1, p. 11 and Appendix A

> is particularly beneficial to those customers with appropriately sized NM systems to generate on average most of their residential needs and does not affect those who produce no NEG.[39]

50. FBC notes that the kWh bank proposal was addressed in the Dissent reasons prior to consideration of the proposed change to the NEG compensation rate. FBC submits that reconsideration is warranted so that the benefits of the kWh bank proposal can be considered on their own merits.

C. The Majority's Approach to the kWh Bank Proposal Resulted in an Error of Law

51. In addition, the Commission panel majority committed an error of law in failing to address the benefits of the kWh bank in connection with its consideration of FBC's proposed change to the compensation rate it pays for NEG.

52. FBC's Application presented the kWh bank and the new NEG compensation rate as a package of NM program changes.[40] There is an interrelationship between these proposed changes. For example, implementing a kWh bank and carrying-forward and then compensating for any NEG annually would be problematic if tiered retail rates are retained as the basis for NEG compensation.[41] There would be no particular basis for choosing one of the available rates to compensate annual NEG.

53. For this reason, the majority erred in failing to consider the implementation of a kWh bank, and its associated benefits, as an additional reason in support of a change from existing NEG pricing based on retail rates. By compartmentalizing the two issues and addressing the kWh bank proposal only after it had already decided against a change in pricing, the majority foreclosed from its consideration factors that were relevant and material to the pricing issue. Whether the NEG compensation rate should be changed was addressed as a question of the public interest and, accordingly, it was an error of law for the Commission panel majority to "exclude from consideration any class or category of interests which form part of the totality of

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[39] Dissent, p. 10
[40] FBC Application, Ex. B-1, p. 10-11
[41] BCUC IR 1.8.2 (Ex. B-4, p. 25)

the general public interest".[42] By not considering the benefits of a kWh bank as part of the public interest determination regarding the proposed NEG pricing change, the majority did just that.

54. The foregoing establishes a *prima facie* basis for the stated legal error. Reconsideration is needed to address both the kWh bank and the NEG compensation price proposals in conjunction. Additional reasons for reconsideration of the Commission panel majority's determination regarding NEG compensation are set out below.

VI. ERRORS IN RESPECT OF THE NEG COMPENSATION DETERMINATION

A. Summary of FBC's Proposed NEG Compensation Price

55. Under the terms of RS 95, as approved in the 2009 NM Decision, if a NM customer is a net generator in any billing period, the NEG "shall be valued at the rates specified in the applicable Rate Schedule and credited to the Customer's account". As described in the Application, residential customers were served under a flat retail energy rate at the time the NM program was originally approved.[43]

56. However, with the implementation of the two-tiered RCR in 2012, pursuant to Commission Order G-3-12 and Decision (the **RIB Decision**), residential NM customers are now compensated for NEG at either the Tier 1 rate for generation up to the threshold of 1,600 kWh over two months or the higher Tier 2 rate for amounts over 1,600 kWh over two months.[44] This treatment is based on the pre-existing tariff language. There is no indication in the RIB Decision or the filings in that proceeding that the effect of the RCR on the NM program was given any consideration at the time.[45]

57. FBC outlined in the Application a number of consequences for the NM program as a result of the implementation of RCR:

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[42] Nakina (Township) v. Canadian National Railway Co. (1986), 69 N.R. 124 at para. 5 (F.C.A.), quoted with approval in Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. B.C. Utilities Commission, 2006 BCCA 537 at para. 27

[43] Application, Ex. B-1, p. 9

[44] *Ibid.;* the Tier 2 threshold is 800 kWh for customers that are billed every month.

[45] BCUC IR 1.10.6 (Ex. B-4, p. 42-43)

(a) NEG can be and is compensated at different dollar values depending on the level generated, without any particular rationale (indeed, as discussed below, contrary to established rate-making principles);

(b) NEG can be and is compensated at the Tier 2 rate of over 15 cents per kWh, which is far in excess of the cost of other comparable resources available to FBC and is actually in excess of any measure of long run marginal cost (**LRMC**) even though NEG is not considered a long term resource; and

(c) the high compensation rate for NEG under the RCR incents generation above the levels needed to offset personal consumption contrary to the intent of the NM program.[46]

58. Accordingly, and on the basis that the kWh bank would also be implemented, FBC proposed that all unused annual NEG produced by program participants be compensated at the BC Hydro RS 3808 Tranche 1 rate.[47] This compensation rate better reflects the value of NEG to FBC and is more consistent with the approach used for pricing ad-hoc deliveries to the FBC system.[48] With the kWh bank in place, customers would continue to receive full retail value for banked kWh that are withdrawn and used to offset consumption in later billing periods.

59. While the Interveners had various different positions regarding the appropriate NEG compensation rate, only one out of eight supported maintaining the use of tiered rates for residential NM customers.[49] Notably, BCOAPO, CEC and BCSEA-SCBC all expressly argued that the existing retail rate is not appropriate.[50]

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[46] Application, Ex. B-1, p. 9
[47] FBC Final Submissions, paras. 18-20
[48] Application, Ex. B-1, p. 11
[49] Majority Decision, p. 16 (see table summarizing views of the parties)
[50] Majority Decision, p. 17; Dissent, p. 14

B. The Majority Applied the Incorrect Test to the NEG Compensation Proposal

60. The majority of the Commission panel rejected FBC's proposed purchase price for NEG under RS 95 and further determined that no change to the existing NEG compensation rate should be made.[51]

61. The majority described its approach to the compensation issue as follows:

> By design, the Program is intended for customers to offset their own consumption. This point has been made repeatedly by FBC, and is accepted by the Panel. The Panel also notes that the Commission, in approving the initial NM Program, found that compensating NEG at retail rates was in the public interest.
>
> The question before this Panel, then, is whether circumstances have changed sufficiently to warrant a departure from that original determination. In our view, they have not.[52]

62. The Commission panel majority determined, for reasons discussed below, that the circumstances had not changed sufficiently since 2009 to depart from the NEG compensation price approved in the 2009 NM Decision. The majority also rejected FBC's proposal because is it was "based on an implicit change in the analytic paradigm from valuing (i.e. pricing) NEG in the context of what a customer pays for each kWh purchased from FBC, to valuing that same kWh in terms of its replacement cost to FBC".[53]

63. FBC submits that this approach had the effect of treating the 2009 NM Decision as a binding form of precedent on a rate issue and required FBC to, in effect, justify overturning the prior Commission decision. This is an error of law. An application under the rate setting provisions of the *UCA* (ss. 58-61) requires the Commission to assess whether the rates collected or proposed to be collected by a public utility are just and reasonable based on all of the evidence in the record before it. Section 75 of the *UCA* is explicit that the Commission must consider each application on its own merits; it provides that, "The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decision".

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[51] Majority Decision, p. 18-19
[52] Majority Decision, p. 18 (underlining added)
[53] Majority Decision, p. 19

64. This provision of the *UCA* is a reflection of the common law principle that administrative tribunals cannot fetter their own discretion. The Federal Court of Canada described the principle as follows on judicial review of a decision of the Canadian Radio-television and Telecommunications Commission:

> As a matter of law ... it is my view that while the CRTC may refer to and take guidance from its earlier decisions, those decisions cannot dictate its subsequent decisions. The CRTC is not bound by precedent and has a legal obligation not to fetter its discretion. As stated in Macauley and Sprague's *Practice and Procedure Before Administrative Tribunals*:
>
> > … the notion of *stare decisis* is not applicable in the administrative sphere. **Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obligated not to do so**. [emphasis added]
>
> The principle that an administrative tribunal cannot use its previous decisions to fetter its discretion was established in *Hopedale Developments Ltd. v Oakville (Town)* (1965), 47 DLR (2d) 482 (ONCA) at 486. The Ontario Court of Appeal held in that case that it would have been an error of law for the Ontario Municipal Board to use precedent to limit the number of issues that it needed to address. Administrative tribunals are permitted to rely on principles articulated in previous decisions as long as the tribunal gives "the fullest hearing and consideration to the whole problem before it."
>
> The prohibition on exclusive reliance by an administrative tribunal on previous decisions includes not only factual and policy decisions but also legal determinations and is essential to ensure that administrative tribunals have the flexibility to respond to new circumstances on a case-by-case basis. The need for flexibility is particularly acute in the case of policy and factual determinations ...[54]

65. The Commission panel majority contravened this principle when it, in effect, deferred to the 2009 NM Decision regarding appropriate NEG pricing and required FBC to justify overturning prior determinations as if it were hearing an appeal. The panel majority also rejected FBC's proposal, at least in part, because of the above-noted "change in analytic paradigm" that, in its view, made using the RS 3808 Tranche 1 rate inappropriate. The 2009 NM Decision was of course relevant to the Commission's consideration of the proposed change to NM pricing.

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[54] *Bell Canada v. Canada (Attorney General)*, 2011 FC 1120 at paras. 88-90 (bolding in original; underlining added)

However, the role of the Commission panel hearing the 2016 Application was to decide itself what the correct "paradigm" was and whether the proposed new price for NEG was in the public interest given the current circumstances of the NM program.

66. As a result, the majority's approach did not result in the "fullest consideration" being given to the NEG compensation issue based on the independent merits of the Application before the Commission and FBC was erroneously required to satisfy a test for approval that was inconsistent with the *UCA*.

67. A *prima facie* basis exists for this error of law and a full reconsideration is warranted to address the NEG compensation issue based on the correct legal test.

C. The Previous Rationale for Compensating NEG at Retail Rates is Inapplicable under RCR

68. Even if the panel majority did not fetter its discretion as described above, it nonetheless erred in concluding that the circumstances had not changed sufficiently to warrant a new price for the compensation of NEG. The implementation of the two-tiered RCR does represent a rate design change that effects a majority of customers in the NM program.

69. The Commission panel majority disagreed that the introduction of two-tiered residential rates made a significant difference to the NM program in the following terms:

> FBC also raised the point that the introduction of two-tiered pricing in some tariffs argues for a change in the price of NEG. That said, given the changes to the tariff, the anticipated Annual NEG for any given Program participant is expected to be in the range of the amounts that FBC anticipated at the outset of the Program when it put forward arguments in favour of using the retail rates for NEG, and the Panel considers those arguments to still be compelling today.[55]

70. This reasoning is flawed for two related reasons. First, it conflates the scope of NEG produced under the NM program with the price at which that NEG is compensated. Clearly the implementation of tiered residential rates has changed the price FBC pays for NEG. FBC now

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[55] Majority Decision, p. 19

compensates NM customers at the much higher Tier 2 rate for a material portion of the NEG they produce. Even if the amount of NEG produced under the NM program is equivalent to what was anticipated in 2009, that does not mean that the overall cost to compensate customers in respect of that NEG has not increased. Second, the panel majority's reasoning seems to imply that the change to RCR only has financial consequences if program participants produce NEG on annual basis. In fact, when their NEG exceeds 1,600 kWh over two months, residential NM customers are receiving billing credits at the Tier 2 rate that is much higher than the credits they received at the pre-RCR retail rates.

71. Furthermore, the rationale for compensating NEG at retail rates no longer applies under the two-tiered RCR system. The use of retail rates to value generation and compensate NEG was originally conceived as a matter of practicality; it was the most cost effective and administratively easy method to implement without the use of a kWh bank and in the context of flat rates.[56]

72. As noted above, one of the main reasons given by the majority of the Commission panel for rejecting FBC's proposed compensation price for NEG in the 2016 Application was that it was contrary to the approved method of pricing NEG "in the context of what a customer pays for each kWh purchased". This description is accurate in respect of the flat retail rates in effect at the time of the 2009 NM Decision where all generation, whether consumed by customers or fed back into the FBC system necessarily had the same notional value within the same customer class.[57] Since two-tiered residential rates were adopted, on the other hand, the value of a given customer's NEG paid for by FBC can be higher than the value of the generation consumed by the same customer during the same billing period.

73. The change to RCR is, in and of itself, a rate design change that does justify an analytical change in how NEG is priced under the NM program. The main purpose of the RCR is to promote conservation; indeed, the higher second tier rate is specifically designed to incent

[56] BCUC IR 1.8.1 (Ex. B-5, p. 24)
[57] Application, Ex. B-1, p. 9

customers to reduce their consumption.[58] If the RCR is operating effectively, then customers should actively be attempting to avoid or minimize their consumption at the Tier 2 rate. When the RCR is applied to the NM program, on the other hand, the incentive for customers is to maximize their self generation because the more they generate the higher the monetary compensation they receive. It is in residential NM customers' best interests to produce as much generation at the Tier 2 level as possible to feed back into FBC's system because of its higher monetary value.

74. Compensating NEG at the Tier 2 rate does not, however, serve the conservation purposes that RCR is intended to achieve. Compensating NM customers for generation at the Tier 2 rate, which is purposively set at a high dollar amount as a disincentive against consumption, has no appreciable benefits for conservation or for load reduction on FBC's electrical system. It simply promotes more generation, frequently at times that are sub-optimal for the Company's overall energy management considerations.[59]

75. Moreover, customers are not in fact compensated at that higher rate because it necessarily matches the rate at which their consumption is valued. Customers can and, as explained in more detail below, do receive compensation for NEG at Tier 2 rates in billing periods where their own consumption is only valued at a Tier 1 rate. The rationale that the compensation rate FBC pays for self-generation should match the rate its customers are charged for consumption is therefore inapplicable under RCR. Likewise, the administrative simplicity and cost-effectiveness that were the original objectives for using retail rates to compensate NEG are now of limited relevance or not being achieved as a result of the higher prices FBC is paying for NEG compared to when the NM program was initially implemented.

76. In the absence of these rationales, there is no justification for FBC to pay NM customers for excess generation at a Tier 2 rate that is significantly higher than the market value of the energy and that is higher even than FBC's LRMC.

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[58] RIB Decision, p. 3
[59] CEC IR 1.1.8 (Ex. B-7, p. 5); BCUC IR 2.13.1 (Ex. B-12, p. 4-5)

D. The Existing NEG Compensation Price Results in Unjust and Unreasonable Rates

77. One of the consequences of the analytical issues associated with maintaining the principle that NEG compensation rates must match retail rates even under RCR is that FBC is not receiving just and reasonable rates for the service provided to its residential customers in some circumstances.

78. Under s. 59(5)(b) of the *UCA* a rate is "unjust" or "unreasonable" if it is "insufficient to yield fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property". The BC Court of Appeal described the legal effect of the *UCA*'s rate setting provisions as follows in *Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)*:

> The *Utilities Commission Act* empowers the commission to determine what is a fair and reasonable rate of return upon the appraised value of the property of regulated utilities, but, having done so, requires the commission to set rates so as to allow recovery of a rate which permits an opportunity to earn that return. In this case, the commission correctly exercised its discretion to determine what a just and reasonable return was, but wrongly failed to permit HVES to charge a rate which gave it an opportunity to earn that return. For this reason, it is my view that commission O. G-77-90 cannot stand, and that O. G-l 1-91 must fall with it.[60]

79. FBC's RCR is necessarily reflective of a fair and reasonable return based on the Company's approved revenue requirement in conformity with ss. 59-61 of the *UCA*.[61] By allowing customers in the NM program to be compensated for NEG at a price that is not actually equivalent to, and can be higher than, the value of the electricity consumed, the panel majority has approved an NM rate that provides less than the fair and reasonable return to FBC.

80. More specifically, NM customers can generate NEG above the 1,600 kWh threshold and be compensated at Tier 2 rates in a given billing period, even if they have not actually consumed

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[60] (1992), 66 B.C.L.R. (2d) 1 at para. 57 (C.A.)
[61] See BCOAPO IR 1.5.2 (Ex. B-5, p. 7)

or been charged for electricity above the Tier 1 threshold during that same period. For example, if a residential customer hypothetically consumed 1,200 kWh over two months and generated 5,000 kWh over the same period, then the customer would be a net generator of 3,800 kWh. Of that NEG, 2,200 kWh would be credited at the Tier 2 rate ($334.35 credit) and 1,600 kWh at the Tier 1 rate ($157.52 credit). Because the customer did not consume electricity above the Tier 1 threshold in this hypothetical billing period, the NEG compensation rate for 2,200 kWh of generation is higher than the rate at which the customer's energy consumption would be valued and charged. The $334.35 credit at the Tier 2 rate is therefore over-compensating the customer with no justification because the rationale that the value of NEG should be the same as the value of consumption is inapplicable.

81. From an economic perspective, the effect of this circumstance is to devalue the power FBC provides to the customer. The price FBC compensates NM customers for NEG must be accounted for in calculating the overall "rate" received from those customers for the utility services provided. When the NEG compensation price matches the rate at which the consumption is valued – as was always the case under flat retail rates – then the rate collected is unaffected for the purposes of FBC's revenue requirement and its right to a fair and reasonable return. On the other hand, when as outlined above, FBC is compensating customers for NEG at a Tier 2 rate, but only valuing energy consumed at a Tier 1 rate during particular billing periods, then FBC is intrinsically receiving lower rates for the energy it delivers than is required for it to make the approved, just and reasonable return.

82. To illustrate the materiality of the issue, FBC has reviewed the billing data for the eight residential customers in the NM program who are most likely to have annual NEG in 2016 to assess the extent to which they were compensated for NEG at a Tier 2 rate in billing periods over the last 12 months where consumption did not exceed the Tier 1 threshold. One of the eight customers did not generate or consume electricity above the Tier 1 threshold in any of the six billing periods reviewed. For the other seven customers that did consume and/or generate above 1,600 kWh in a billing period in 2016, this review demonstrated that:

(a) five of the seven customers were compensated for NEG at Tier 2 rates in at least one billing period in which consumption was only valued at Tier 1;

(b) two of the customers were compensated for NEG at Tier 2 rates without consuming electricity above the Tier 1 threshold in all six billing periods; and

(c) in over one third of the bills for these customers, NEG was compensated at Tier 2 rates without any consumption above the Tier 1 threshold, with in one case, the amount of generation compensated at Tier 2 exceeding 100,000 kWh with no corresponding Tier 2 consumption at all.

83. FBC can provide the 2016 generation and consumption data for the eight customers reviewed as new evidence if a second phase process for this Reconsideration Application is ordered.

E. Implications of the Errors in Respect of NEG Compensation

84. FBC submits that the asserted errors in respect of the majority's NEG compensation determination are substantiated on a *prima facie* basis and warrant reconsideration. The compensation paid for NEG and the resulting rates FBC receives from NM customers are central issues to the NM program in general and have material implications not just for FBC and RS 95 customers, but for all other FBC rate payers. FBC is paying a significant premium to NM customers for NEG that reaches the Tier 2 threshold and the justification relied upon by the majority to support this practice is not actually applicable in current circumstances.

85. FBC also notes that the Commission's other directions regarding changes to RS 95, which the panel majority said had "resolved" the issue of persistent NEG "on a go-forward basis"[62] do not alleviate the under-recovery of approved rates from NM customers. The rate discrepancy problem that results from RCR is not limited to those customers that generate annual NEG, it can potentially apply to any residential customers that generate electricity at a Tier 2 level. The NM program has gradually expanded since its inception and there is no reason to believe it will not continue to expand. It is therefore incumbent that the issue be addressed on a full consideration of all relevant factors, based on the correct legal test under the *UCA*, and that

[62] Majority Decision, p. 18-19

the price yield just and reasonable rates in conformity with the *UCA*. If it is not, then the rate issue will only become more exacerbated over time.

VII. WHETHER NEW EVIDENCE SHOULD BE HEARD AT PHASE 2

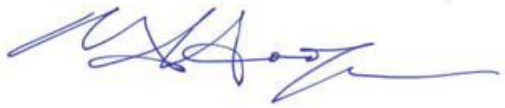
86. FBC seeks leave to file new evidence, should it determine that doing so is appropriate, at the second phase of the reconsideration process. Any new evidence would likely be in respect of the NEG compensation issues, including the generation and consumption data described above at paragraphs 82-83 of this Reconsideration Application.

VIII. CONCLUSION

87. FBC respectfully submits that legal and factual errors identified above have been substantied on a *prima facie* basis and have sufficiently material implications. The Commission should order that FBC's Reconsideration Application proceed to a phase 2 hearing process.

88. FBC also requests a stay of paragraph 2 of Order G-199-16, directing that proposed changes to RS 95 be submitted to the Commission, pending the resolution of this Reconsideration Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



March 17, 2017
Dated

Nicholas T. Hooge
Farris, Vaughan, Wills & Murphy LLP
Counsel for FortisBC Inc.

THIS Reconsideration Application is prepared and delivered by Nicholas T. Hooge of the firm Farris, Vaughan, Wills & Murphy LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. **Attention: Nicholas T. Hooge**.

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF
the *Utilities Commission Act*, R.S.B.C. 1996, chapter 473

and

FortisBC Inc. Application for Reconsideration and Variance of
Commission Order G-199-16 on the FortisBC Inc.
Net Metering Tariff Update Application

BOOK OF AUTHORITIES OF FORTISBC INC.

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Nicholas T. Hooge

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TAB 1

This Act is Current to February 20, 2017

This Act has "Not in Force" sections. *See* the Table of Legislative Changes.

UTILITIES COMMISSION ACT

[RSBC 1996] CHAPTER 473

Contents

Definitions

1 In this Act:

"appraisal" means appraisal by the commission;

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

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

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

"compensation" means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it;

"costs" includes fees, counsel fees and expenses;

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

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

"expenses" includes expenses of the commission;

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

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

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

(c) the storage of petroleum or petroleum products;

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

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

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

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

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

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

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

but does not include

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

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

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

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

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

"rate" includes

(a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,

(b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and

(c) a schedule or tariff respecting a rate;

"service" includes

(a) the use and accommodation provided by a public utility,

(b) a product or commodity provided by a public utility, and

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

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

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

Part 1 — Utilities Commission

Commission continued

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

(a) one commissioner designated as the chair;

(b) other commissioners appointed after consultation with the chair.

(2) The Lieutenant Governor in Council, after consultation with the chair, may designate a commissioner appointed under subsection (1) (b) as a deputy chair.

(3) The chair may appoint a deputy chair or commissioner to act as chair for any purpose specified in the appointment.

(4) [Repealed 2015-10-189.]

(4.1) Section 47 (2) of the *Administrative Tribunals Act* applies to the commission respecting an order for costs under sections 117 and 118 of this Act.

(5) The chair is the chief executive officer of the commission and has supervision over and direction of the work of the other commissioners and the chief operating officer.

Application of *Administrative Tribunals Act*

2.1 The following provisions of the *Administrative Tribunals Act* apply to the commission, and, for that purpose, a reference in those provisions to a vice chair under that Act must be read as a reference to a deputy chair under this Act:

(a) Part 1 *[Interpretation and Application]*;

(b) Part 2 *[Appointments]*;

(c) Part 3 *[Clustering]*;

(d) Part 4 *[Practice and Procedure]*, except the following:

(i) section 14 *[general power to make orders]*;

(ii) section 16 *[consent orders]*;

(iii) section 17 *[withdrawal or settlement of application]*;

(iv) section 22 *[notice of appeal (inclusive of prescribed fee)]*;

(v) section 23 *[notice of appeal (exclusive of prescribed fee)]*;

(vi) section 24 *[time limit for appeals]*;

(vii) section 25 *[appeal does not operate as stay]*;

(viii) section 26 *[organization of tribunal]*;

(ix) section 27 *[staff of tribunal]*;

(x) section 31 *[summary dismissal]*;

(xi) section 34 (1) and (2) *[party power to compel witnesses and order disclosure]*;

(e) section 44 *[tribunal without jurisdiction over constitutional questions]*;

(f) section 46.3 *[tribunal without jurisdiction to apply the Human Rights Code]*;

(g) section 48 *[maintenance of order at hearings]*;

(h) section 49 *[contempt proceeding for uncooperative witness or other person]*;

(i) section 54 *[enforcement of tribunal's final decision]*;

(j) section 56 *[immunity protection for tribunal and members]*;

(k) section 59.1 *[surveys]*;

(l) section 59.2 *[reporting]*;

(m) section 60 (1) (a), (b) and (g) to (i) and (2) *[power to make regulations]*;

(n) section 61 *[application of Freedom of Information and Protection of Privacy Act]*.

Commission subject to direction

3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.

(2) The commission must comply with a direction issued under subsection (1), despite

(a) any other provision of

(i) this Act, except subsection (3) of this section, or

(ii) the regulations,

(a.1) any provision of the *Clean Energy Act* or the regulations under that Act, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

Sittings and divisions

4 (1) The commission

(a) must sit at the times and conduct its proceedings in a manner it considers convenient for the proper discharge and speedy dispatch of its duties under this Act.

(b) [Repealed 2004-45-164.]

(2) The chair may organize the commission into divisions.

(3) The commissioners must sit

(a) as the commission, or

(b) as a division of the commission.

(4) If commissioners sit as a division

(a) 2 or more divisions may sit at the same time,

(b) the division has all the jurisdiction of and may exercise and perform the powers and duties of the commission, and

(c) a decision or action of the division is a decision or action of the commission.

(5) At a sitting of the commission or of a division of the commission, one commissioner is a quorum.

(6) The chair may designate a commissioner to serve as chair at any sitting of the commission or a division of it.

(7) If a proceeding is being held by the commission or by a division and a sitting commissioner is absent or unable to attend,

(a) that commissioner is thereafter disqualified from continuing to sit on the proceeding, and

(b) despite subsection (5), the commissioner or commissioners remaining present and sitting must exercise and perform all the jurisdiction, powers and duties of the commission.

(8) and (9) [Repealed 2003-46-2.]

(10) In the case of a tie vote at a sitting of the commission or a division of the commission, the decision of the chair of the commission or the division governs.

(11) If a division is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the commission, with the consent of all parties to the application, may organize a new division to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

Commission's duties

5 (0.1) [Repealed 2010-22-61.]

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

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

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

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

Repealed

6 [Repealed 2004-45-165.]

Employees

7 (1) The commission

(a) must employ a chief operating officer,

(b) may employ a secretary and other officers and employees it considers necessary, and

(c) may, subject to sections 9.1 and 10, determine the duties, the conditions of employment and the remuneration of the persons employed under paragraph (a) or (b) of this subsection.

(2) The *Public Service Act* does not apply to the employment of persons under subsection (1).

Technical consultants

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

Pensions

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

(a) a pension or superannuation plan, or

(b) a group insurance plan

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

Chief operating officer's duties

9.1 Subject to section 2 (5), the chief operating officer must

(a) oversee the operations of the commission, and

(b) supervise the work of the persons referred to in section 8 and the commission's employees.

Secretary's duties

10 (1) The secretary must

(a) keep a record of the proceedings before the commission,

(b) ensure that every rule, regulation and order of the commission is filed in the records of the commission,

(c) have custody of all rules, regulations and orders made by the commission and all other records and documents of, or filed with, the commission, and

(d) carry out the instructions and directions of the commission under this Act respecting the secretary's duties or office.

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

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

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

Conflict of interest

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

(a) hold, acquire or have a beneficial interest in a share, stock, bond, debenture or other security of a corporation or other person subject to regulation under Part 3 of this Act,

(b) have a significant beneficial interest in a device, appliance, machine, article, patent or patented process, or a part of it, that is required or used by a corporation or other person referred to in paragraph (a) for the purpose of its equipment or service, or

(c) have a significant beneficial interest in a contract for the construction of works or the provision of a service for or by a corporation or other person referred to in paragraph (a).

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

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

Obligation to keep information confidential

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

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

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

Annual report

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

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

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

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

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

Part 2

Repealed

14–20 [Repealed 2003-46-5.]

Part 3 — Regulation of Public Utilities

Application of this Part

21 (1) This Part applies only to a public utility that is subject to the legislative authority of the Province.

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

Exemptions

22 (1) In this section, **"minister"** means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(2) The minister, by regulation, may

(a) exempt from any or all of section 71 and the provisions of this Part

(i) a public utility, or

(ii) a public utility in respect of any equipment, facility, plant, project, activity, contract, service or system of the public utility, and

(b) in respect of an exemption made under paragraph (a), impose any terms and conditions the minister considers to be in the public interest.

(3) The minister, before making a regulation under subsection (2), may refer the matter to the commission for a review.

General supervision of public utilities

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

(a) equipment,

(b) appliances,

(c) safety devices,

(d) extension of works or systems,

(e) filing of rate schedules,

(f) reporting, and

(g) other matters it considers necessary or advisable for

(i) the safety, convenience or service of the public, or

(ii) the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

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

Commission must make examinations and inquiries

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

(a) the conduct of public utility business,

(b) compliance by public utilities with this Act, regulations or any other law, and

(c) any other matter in the commission's jurisdiction.

Commission may order improved service

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

(a) determine what is reasonable, safe, adequate and fair service, and

(b) order the utility to provide it.

Commission may set standards

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

(a) determine and set just and reasonable standards, classifications, rules, practices or service to be used by a public utility;

(b) determine and set adequate and reasonable standards for measuring quantity, quality, pressure, initial voltage or other conditions of supplying service;

(c) prescribe reasonable regulations for examining, testing or measuring a service;

(d) establish or approve reasonable standards for accuracy of meters and other measurement appliances;

(e) provide for the examination and testing of appliances used to measure a service of a utility.

Joint use of facilities

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

(a) public convenience and necessity require the use by a public utility of conduits, subways, poles, wires or other equipment belonging to another public utility, and

(b) the use will not prevent the owner or other users from performing their duties or result in any substantial detriment to their service,

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

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

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

(a) direct that the cost of the placing, construction or equipment be at the expense of the public utility whose wire, cable or apparatus was most recently placed, or

(b) in the discretion of the commission, apportion the cost between the utilities.

Utility must provide service if supply line near

28 (1) On being requested by the owner or occupier of the premises to do so, a public utility must supply its service to premises that are located within 200 metres of its supply line or any lesser distance that the commission prescribes suitable for that purpose.

(2) Before supplying the service under subsection (1) or making a connection for the purpose, or as a condition of continuing to supply the service, the public utility may require the owner or occupier to give reasonable security for repayment of the costs of making the connection as set out in the filed schedule of rates.

(2.1) If required to do so by regulation, the commission, in accordance with the prescribed requirements, must set a rate for the authority respecting the service provided under subsection (1).

(2.2) A requirement prescribed for the purposes of subsection (2.1) applies despite

(a) any other provision of this Act or any regulation under this Act, except for a regulation under section 3, or

(b) any previous decision of the commission.

(3) After a hearing and for proper cause, the commission may relieve a public utility from the obligation to supply service under this Act on terms the commission considers proper and in the public interest.

Commission may order utility to provide service if supply line distant

29 On the application of a person whose premises are located more than 200 metres from a supply line suitable for that purpose, the commission may order a public utility that controls or operates the line

(a) to supply, within the time the commission directs, the service required by that person, and

(b) to make extensions and install necessary equipment and apparatus on terms the commission directs, which terms may include payment of all or part of the cost by the applicant.

Commission may order extension of existing service

30 If the commission, after a hearing, determines that

(a) an extension of the existing services of a public utility, in a general area that the public utility may properly be considered

responsible for developing, is feasible and required in the public interest, and

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

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

Regulation of agreements

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

Use of municipal thoroughfares

32 (1) This section applies if a public utility

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

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

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

Dispensing with municipal consent

33 (1) This section applies if a public utility

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

(b) the public utility is otherwise unable, without expenditures that the commission considers unreasonable, to extend its system, line or apparatus from a place where it lawfully does business to another place where it is authorized to do business.

(2) On application and after a hearing, for the purpose of that extension only and without unduly preventing the use of the street or other place by other persons, the commission may, by order,

(a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and

(b) specify the manner and terms of the use.

Order to extend service in municipality

34 (1) On the complaint of a municipality that a public utility doing business in the municipality fails to extend its service to a part of the municipality, and after any hearing the commission considers advisable, the commission may order the public utility to extend its service in a way that the commission considers reasonable and proper.

(2) An order under subsection (1) may

(a) in the commission's discretion, impose terms for the extension, including the expenditure to be incurred for all necessary works, and

(b) apportion the cost between the public utility, the municipality and consumers receiving service from the extension.

Other orders to extend service

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

Use of municipal structures

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

(a) a highway in the municipality, or

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

Supervisors and inspectors

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

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

(b) adequacy of service,

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

(2) The commission may

(a) set the salary and expenses of a supervisor or inspector appointed under subsection (1), and

(b) order the amount set

(i) to be borne by the municipality in which the operations of the public utility are carried on or its service is provided, or

(ii) to be borne or apportioned in a way the commission considers equitable.

Public utility must provide service

38 A public utility must

(a) provide, and

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

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

No discrimination or delay in service

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

(a) apply for service,

(b) are reasonably entitled to it, and

(c) pay or agree to pay the rates established for that service under this Act.

Exemption for part of municipality

40 (1) On application, the commission may, by order, exempt a municipality from section 39 except in a defined area.

(2) On application by any person and after notice to the municipality, the commission may enlarge or reduce an area defined under subsection (1).

No discontinuance without permission

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

Duty to obey orders

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

Duty to provide information

43 (1) A public utility must, for the purposes of this Act,

(a) answer specifically all questions of the commission, and

(b) provide to the commission

(i) the information the commission requires, and

(ii) a report, submitted annually and in the manner the commission requires, regarding the demand-side measures taken by the public utility during the period addressed by the report, and the effectiveness of those measures.

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

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

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

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

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

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

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

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

(c) other officers of the utility.

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

Duty to keep records

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

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

Long-term resource and conservation planning

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

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

(a) an estimate of the demand for energy the public utility would expect to serve if the public utility does not take new demand-side measures during the period addressed by the plan;

(b) a plan of how the public utility intends to reduce the demand referred to in paragraph (a) by taking cost-effective demand-side measures;

(c) an estimate of the demand for energy that the public utility expects to serve after it has taken cost-effective demand-side measures;

(d) a description of the facilities that the public utility intends to construct or extend in order to serve the estimated demand referred to in paragraph (c);

(e) information regarding the energy purchases from other persons that the public utility intends to make in order to serve the estimated demand referred to in paragraph (c);

(f) an explanation of why the demand for energy to be served by the facilities referred to in paragraph (d) and the purchases referred to in paragraph (e) are not planned to be replaced by demand-side measures;

(g) any other information required by the commission.

(3) The commission may exempt a public utility from the requirement to include in a long-term resource plan filed under subsection (2) any of the information referred to in paragraphs (a) to (f) of that subsection if the commission is satisfied that the information is not applicable with respect to the nature of the service provided by the public utility.

(4) [Repealed 2010-22-65.]

(5) The commission may establish a process to review long-term resource plans filed under subsection (2).

(6) After reviewing a long-term resource plan filed under subsection (2), the commission must

(a) accept the plan, if the commission determines that carrying out the plan would be in the public interest, or

(b) reject the plan.

(7) The commission may accept or reject, under subsection (6), a part of a public utility's plan, and, if the commission rejects a part of a plan,

(a) the public utility may resubmit the part within a time specified by the commission, and

(b) the commission may accept or reject, under subsection (6), the part resubmitted under paragraph (a) of this subsection.

(8) In determining under subsection (6) whether to accept a long-term resource plan, the commission must consider

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

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

(c) whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures, and

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

(9) In accepting under subsection (6) a long-term resource plan, or part of a plan, the commission may do one or both of the following:

(a) order that a proposed utility plant or system, or extension of either, referred to in the accepted plan or the part is exempt from the operation of section 45 (1);

(b) order that, despite section 75, a matter the commission considers to be adequately addressed in the accepted plan or the part is to be considered as conclusively determined for the purposes of any hearing or proceeding to be conducted by the commission under this Act, other than a hearing or proceeding for the purposes of section 99.

Expenditure schedule

44.2 (1) A public utility may file with the commission an expenditure schedule containing one or more of the following:

(a) a statement of the expenditures on demand-side measures the public utility has made or anticipates making during the period addressed by the schedule;

(b) a statement of capital expenditures the public utility has made or anticipates making during the period addressed by the schedule;

(c) a statement of expenditures the public utility has made or anticipates making during the period addressed by the schedule to acquire energy from other persons.

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

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

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

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

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

(b) reject the schedule.

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

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

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

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

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

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

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

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

(a) British Columbia's energy objectives,

(b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*,

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

(d) if the schedule includes expenditures on demand-side measures, the extent to which the demand-side measures are cost-effective within the meaning prescribed by regulation, if any.

(6) If the commission considers that an expenditure in an expenditure schedule was determined to be in the public interest in the course of determining that a long-term resource plan was in the public interest under section 44.1 (6),

(a) subsection (5) of this section does not apply with respect to that expenditure, and

(b) the commission must accept under subsection (3) the expenditure in the expenditure schedule.

Certificate of public convenience and necessity

45 (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

(a) to operate the plant or system, and

(b) subject to subsection (5), to construct and operate extensions to the plant or system.

(3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

(4) The commission may, by regulation, exclude a utility plant or categories of utility plants from the operation of subsection (1).

(5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the

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

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

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

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

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

(9) In giving its approval, the commission

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

(b) may impose conditions about

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

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

as the public convenience and interest reasonably require.

Procedure on application

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

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

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

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

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

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

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

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

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

(a) British Columbia's energy objectives,

(b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*, and

(c) the extent to which the application for the certificate is consistent with the requirements under section 19 of the *Clean Energy Act*.

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

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

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

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

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

Order to cease work

47 (1) If a public utility

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

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

any interested person may file a complaint with the commission.

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

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

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

Cancellation or suspension of franchises and permits

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

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

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

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

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

Accounts and reports

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

(a) keep the records and accounts of the conduct of the utility's business that the commission may specify, and for public utilities of the same class, adopt a uniform system of accounting specified by the commission;

(b) provide, at the times and in the form and manner the commission specifies, a detailed report of finances and operations, verified as specified;

(c) file with the commission, at the times and in the form and manner the commission specifies, a report of every accident occurring to or on the plant, equipment or other property of the utility, if the accident is of such nature as to endanger the safety, health or property of any person;

(d) obtain from a board, tribunal, municipal or other body or official having jurisdiction or authority, permission, if necessary, to undertake or carry on a work or service ordered by the commission to be undertaken or carried on that is contingent on the permission.

Commission approval of issue of securities

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

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

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

(a) in respect of a security that it has issued,

(i) increase a fixed dividend or fixed interest rate,

(ii) alter a maturity date for the issue,

(iii) restrict the utility's right to redeem the issue,

(iv) increase the premium to be paid on redemption, or

(v) make a material alteration in the characteristics of the security, or

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

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

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

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

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

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

Restraint on capitalization

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

(a) capitalize a franchise or right to be a corporation;

(b) capitalize a franchise, licence, permit or concession in excess of the amount that, exclusive of tax or annual charge, is paid to the government, a municipality or other public authority as consideration for the franchise, licence, permit or concession;

(c) issue a security or evidence of indebtedness against a contract for consolidation, amalgamation, merger or lease.

Restraint on disposition

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

(a) dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights, or

(b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licences, permits, concessions, privileges or rights with those of another person.

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

Consolidation, amalgamation and merger

53 (1) A public utility must not consolidate, amalgamate or merge with another person

(a) unless the Lieutenant Governor in Council

(i) has first received from the commission a report under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and

(ii) has, by order, consented to the consolidation, amalgamation or merger, and

(b) except in accordance with an order made under paragraph (a).

(2) The Lieutenant Governor in Council may, in an order under subsection (1) (a), include conditions and requirements that the Lieutenant Governor in Council considers necessary or advisable.

(3) An application for consent of the Lieutenant Governor in Council under subsection (1) must be made to the commission by the public utility.

(4) The commission must inquire into the application and may for that purpose hold a hearing.

(5) On conclusion of its inquiry, the commission must,

(a) if it is of the opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, submit its report and findings to the Lieutenant Governor in Council, or

(b) dismiss the application.

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

(a) set out in the notice the provisions of this section, and

(b) file a copy of the notice with the commission at the time of mailing to the shareholders.

Reviewable interests

54 (1) In this section:

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

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

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

(a) whose bids are made jointly or in concert, or

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

"spouse" means a person who

(a) is married to another person, or

(b) is living with another person in a marriage-like relationship, and has lived in that relationship for a period of at least 2 years;

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

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

(a) a security convertible into such a share, and

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

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

(a) one of the persons is a corporation

(i) of which more than 10% of the shares outstanding of any class of the corporation are beneficially owned or controlled, directly or indirectly, by the other person, or

(ii) of which the other is a director or officer;

(b) each of the persons is a corporation and

(i) more than 10% of the shares outstanding of any class of shares of one are beneficially owned or controlled, directly or indirectly, by the other, or

(ii) more than 10% of the shares outstanding of any class of shares of each are beneficially owned or controlled, directly or indirectly, by the same person;

(c) they are partners or one is a partnership of which the other is a partner;

(d) one is a trust in which the other has a substantial beneficial interest or for which the other serves as trustee or in a similar capacity;

(e) they are obligated to act in concert in exercising a voting right in respect of shares of the utility;

(f) one is the spouse or child of the other;

(g) one is a relative of the other or of the other's spouse and has the same home as the other.

(3) For the purpose of subsection (2), if a person has more than one associate, those associates are associates of each other.

(4) For the purpose of this section, a person has a reviewable interest in a public utility if

(a) the person owns or controls, or

(b) the person and the person's associates own or control,

in the aggregate more than 20% of the voting shares outstanding of any class of shares of the utility.

(5) A public utility must not, without the approval of the commission,

(a) issue, sell, purchase or register on its books a transfer of shares in the capital of the utility or create, or

(b) attach to any shares, whether issued or unissued, any special rights or restrictions,

if the issue, sale, purchase or registration or the creation or attachment of the special rights or restrictions would

(c) cause any person to have a reviewable interest,

(d) increase the percentage of voting shares owned by a person who has a reviewable interest,

(e) be a registration of a transfer of shares, the acquisition of which was contrary to subsection (7) or (8), or

(f) increase the voting rights attached to any shares owned by a person who has a reviewable interest.

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

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

(a) in themselves, or

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

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

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

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

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

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

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

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

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

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

Appraisal of utility property

55 (1) The commission may

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

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

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

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

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

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

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

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

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

Depreciation accounts and funds

56 (1) If the commission, after inquiry, considers that it is necessary and reasonable that a depreciation account should be carried by a public utility, the commission may, by order, require the utility to keep an adequate depreciation account under rules and forms of account specified by the commission.

(2) The commission must determine and, by order after a hearing, set proper and adequate rates of depreciation.

(3) The rates must be set so as to provide, in addition to the expense of maintenance, the amounts required to keep the public utility's property in a state of efficiency in accordance with technical and engineering progress in that industry of the utility.

(4) A public utility must adjust its depreciation accounts to conform to the rates set by the commission and, if ordered by the commission, must set aside out of earnings whatever money is required and carry it in a depreciation fund.

(5) Without the consent of the commission, the depreciation fund must not be expended other than for replacement, improvement, new construction, extension or addition to the property of the utility.

Reserve funds

57 (1) The commission may, by order, require a public utility to create and maintain a reserve fund for any purpose the commission considers proper, and may set the amount or rate to be charged each year in the accounts of the utility for the purpose of creating the reserve fund.

(2) The commission may order that no reserve fund other than that created and maintained as directed by the commission may be created by a public utility.

Commission may order amendment of schedules

58 (1) The commission may,

(a) on its own motion, or

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

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

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

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

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

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

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

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

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

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

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

(b) file amended schedules with the commission.

Rate rebalancing

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

(2) This section applies despite

(a) any other provision of

(i) this Act, or

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

(b) any previous decision of the commission.

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

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

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

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

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

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

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

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

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

Discrimination in rates

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

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

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

(2) A public utility must not

(a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or

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

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

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

(a) whether a rate is unjust or unreasonable,

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

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

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

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

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

(c) unjust and unreasonable for any other reason.

Setting of rates

60 (1) In setting a rate under this Act

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

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

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

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

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

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

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

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

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

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

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

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

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

Rate schedules to be filed with commission

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

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

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

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

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

(a) on complaint of a person whose interests are affected, or

(b) on its own motion,

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

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

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

(b) confirm the increase or part of it.

Schedules must be available to public

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

Schedules must be observed

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

Orders respecting contracts

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

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

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

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

Part 3.1

Repealed

64.01–64.04 [Repealed 2010-22-69.]

Part 4 — Carriers, Purchasers and Processors

Definition

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

Common carrier

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

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

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

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

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

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

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

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

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

(a) a toll that may be charged by the common carrier;

(b) extensions, improvements or abandonment of service.

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

(4) A common carrier must not unreasonably discriminate

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

(b) among the persons who so apply.

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

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

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

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

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

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

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

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

Common purchaser

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

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

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

(4) A common purchaser must not unreasonably discriminate

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

(b) among the persons who so apply.

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

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

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

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

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

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

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

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

Common processor

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

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

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

(4) A common processor must not unreasonably discriminate

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

(b) among the persons who so apply.

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

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

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

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

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

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

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

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

Part 5 — Electricity Transmission

Definitions

68 In this Part:

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

"energy" means electricity or natural gas;

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

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

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

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

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

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

Repealed

69 [Repealed 2003-46-10.]

Use of electricity transmission facilities

70 (1) On application and after a hearing, the commission may make an order directing a public utility to allow a person, other than a public utility,

to use the electricity transmission facilities of the public utility if the commission finds that

(a) the person and the public utility have failed to agree on the use of the facilities or on the conditions or compensation for their use,

(b) the use of the facilities will not prevent the public utility or other users from performing their duties or result in any substantial detriment to their service, and

(c) the public interest requires the use of the facilities by the person.

(2) An order under subsection (1) may contain terms and conditions the commission considers advisable, including terms and conditions respecting the rates payable to the public utility for the use of its electricity transmission facilities.

(3) After a hearing, the commission may, by order, vary or rescind an order made under this section.

(4) Any interested person may apply to the commission for an order under this section, and the application must contain the information the commission specifies.

Energy supply contracts

71 (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

(a) file a copy of the contract with the commission under rules and within the time it specifies, and

(b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

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

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

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

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

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

(e) the quantity of the energy to be supplied under the contract,

(f) the availability of supplies of the energy referred to in paragraph (e),

(g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and

(h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

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

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

(a) British Columbia's energy objectives,

(b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*,

(c) the extent to which the energy supply contract is consistent with the requirements under section 19 of the *Clean Energy Act*,

(d) the quantity of the energy to be supplied under the contract,

(e) the availability of supplies of the energy referred to in paragraph (d),

(f) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (d), and

(g) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (d).

(2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.

(2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.

(2.5) In considering the public interest under subsection (2.4) with respect to a submission by a public utility other than the authority, the commission must consider

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

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

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

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

(2.51) In considering the public interest under subsection (2.4) with respect to a submission by the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider

(a) British Columbia's energy objectives,

(b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*, and

(c) the extent to which the application for the proposed contract is consistent with the requirements under section 19 of the *Clean Energy Act*.

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

(a) entered into exclusively on the terms and conditions, and

(b) as a result of the process

referred to in subsection (2.3).

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

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

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

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

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

Gas marketers

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

(a) the person is a public utility and the public utility performs the gas marketing activity within any area in which it is authorized to provide service, or

(b) the person holds a gas marketer licence issued to the person under subsection (6) (a).

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

(a) sells or offers to sell natural gas to a low-volume consumer,

(b) acts as the agent or broker for a seller in a sale of natural gas to a low-volume consumer, or

(c) acts or offers to act as the agent or broker of a low-volume consumer in a purchase of natural gas.

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

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

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

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

(b) if the person is a gas marketer,

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

(ii) suspend or cancel the gas marketer licence.

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

(6) The commission may

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

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

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

(d) suspend or cancel a gas marketer licence.

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

(8) The commission may order that some or all of the security posted by a gas marketer in accordance with a requirement imposed under subsection (7) be paid out to those persons who the commission considers have been or may be affected by an act or omission of the gas marketer.

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

(10) The commission may make the following rules:

(a) defining "low-volume consumer";

(b) respecting the process by which application may be made for a gas marketer licence and specifying the form and content of applications for that licence;

(c) respecting the imposition of terms and conditions on gas marketer licences;

(d) requiring an applicant for a gas marketer licence to obtain a bond, letter of credit or other specified security and requiring the filing with the commission of proof, satisfactory to the commission, of that security;

(e) respecting the form and content of security that may be required under paragraph (d) and the person by whom and the terms on which it is to be held;

(f) respecting the circumstances in which and the persons to whom disbursement of some or all of the security required under paragraph (d) is to be made.

Part 6 — Commission Jurisdiction

Jurisdiction of commission to deal with applications

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

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

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

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

Mandatory and restraining orders

73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or

may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.

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

Inspections

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

(a) enter on and inspect property, and

(a.1) inspect and make copies of records.

(b) [Repealed 2012-27-33.]

Commission not bound by precedent

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

Jurisdiction as to liquidators and receivers

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

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

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

Power to extend time

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

(a) on notice and hearing, or

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

Evidence

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

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

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

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

Findings of fact conclusive

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

Commission not bound by judicial acts

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

Pending litigation

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

Power to inquire without application

82 (1) The commission

(a) may, on its own motion, and

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

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

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

Action on complaints

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

General powers not limited

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

Hearings to be held in certain cases

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

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

Public hearing

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

Repealed

86.1 [Repealed 2004-45-170.]

When oral hearings not required

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

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

Recitals not required in orders

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

Application of orders

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

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

(3) The commission may, on conditions it considers advisable, with the advance approval of the minister responsible for the administration of the *Hydro and Power Authority Act*, exempt a person, equipment or facilities from the application of all or any of the provisions of this Act or may limit or vary the application of this Act.

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

Withdrawal of application

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

Partial relief

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

Commencement of orders

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

(a) at a future time,

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

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

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

Orders without notice

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

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

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

Directions

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

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

(b) at whose cost and expense,

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

(d) under what supervision,

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

Repealed

93–94 [Repealed 2004-45-170.]

Lien on land

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

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

Substitute to carry out orders

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

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

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

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

Entry, seizure and management

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

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

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

(4) On the commission taking possession of the business and property of the utility, each officer and employee of the utility must obey the lawful orders and instructions of the commission for that business and property, and of any person placed by the commission in authority in the management of the utility or a department of its undertaking or service.

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

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

Defaulting utility may be dissolved

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

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

Part 7 — Decisions and Appeals

Reconsideration

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

Requirement for hearing

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

Appeal to Supreme Court or Court of Appeal

101 (1) An appeal lies from

(a) a decision of the commission under section 109.1 or 109.2 to the Supreme Court, and

(b) any other decision or order of the commission to the Court of Appeal, with leave of a justice of that court.

(2) The party appealing under subsection (1) (b) must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.

(3) If leave is granted under subsection (1) (b), within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

(4) The commission and the Attorney General may be heard on an appeal under subsection (1) (b).

(4.1) The commission has full party status on an appeal under subsection (1) (a).

(5) [Repealed 2012-27-36.]

Stay on appeal

102 (1) An appeal to the Court of Appeal does not of itself stay or suspend the operation of the decision, order, rule or regulation appealed from, but the Court of Appeal may grant a suspension, in whole or in part, until the appeal is decided, on the terms the court considers advisable.

(2) The commission may, in its discretion, suspend the operation of its decision, order, rule or regulation from which an appeal is taken under section 101 (1) (b) until the decision of the Court of Appeal is given.

(3) An appeal to the Supreme Court under section 101 (1) (a) operates as a stay of the decision under section 109.2 to impose an administrative penalty, unless the court orders otherwise.

Costs of appeal

103 (1) [Repealed 2012-27-38.]

(2) Neither the commission nor an officer, employee or agent of the commission is liable for costs in respect of an application or appeal referred to in section 101.

Case stated by commission

104 (1) The commission may, on its own motion or on the application of a party who gives the security the commission directs, and must, on the request of the Attorney General, state a case in writing for the opinion of the Court of Appeal on a question that, in the opinion of the commission or of the Attorney General, is a question of law.

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

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

Jurisdiction of commission exclusive

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

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

Part 8 — Offences and Penalties

Offences

106 (1) The following persons commit an offence:

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

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

(c) a public utility

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

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

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

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

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

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

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

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

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

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

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

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

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

(ix) who knowingly registers or causes to be registered on the books of the public utility any issue or transfer of shares that has been made contrary to section 54 (5), (7) or (8);

(e) the president, and each vice president, director, managing director, superintendent and manager of a public utility that

fails or refuses to obey an order of the commission made under this Act;

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

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

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

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

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

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

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

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

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

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

(4) A person convicted of an offence under this section is liable to a penalty not greater than $1 000 000.

(5) If this Act makes anything an offence, each day the offence continues constitutes a separate offence.

(6) Subject to section 109.2 (4), nothing in or done under this section affects the liability of a public utility otherwise existing or prejudices enforcement of an order of the commission in any way otherwise available.

(7) If the commission imposes on a person an administrative penalty under section 109.2, a prosecution for an offence under this Act for the same contravention may not be brought against the person.

Restraining orders

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

(a) a regulation under section 22,

(b) a certificate of public convenience and necessity issued under section 46,

(c) an approval under section 50 or 54 (5), (7) or (8),

(d) an order under section 53 or 54 (10), or

(e) a reliability standard adopted under section 125.2,

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

Repealed

108 [Repealed 2012-27-42.]

Remedies not mutually exclusive

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

Part 8.1 — Administrative Penalties

Contraventions

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

(a) this Act or the regulations, or

(b) an order, standard or rule of the commission or a reliability standard adopted by the commission.

(2) If a corporation contravenes a provision referred to in subsection (1), a director, officer or agent of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

(3) Without limiting section 112, if an employee, contractor or agent of a corporation contravenes a provision referred to in subsection (1) of this section in the course of carrying out the employment, contract or agency, the corporation also contravenes the provision.

(4) The commission may not find that a person has contravened a provision referred to in subsection (1) if the person demonstrates to the satisfaction of the commission that

(a) the person exercised due diligence to prevent the contravention, or

(b) the person's actions or omissions relevant to the provision were the result of an officially induced error.

(5) Nothing in subsection (4) prevents the commission from doing anything else that the commission is authorized to do under this Act with respect to an act or omission by the person.

(6) If a person referred to in subsection (2) or (3) has not contravened a provision referred to in subsection (1) as a result of demonstrating to the satisfaction of the commission anything referred to in subsection (4), the commission may find, subject to subsection (4), that any of the other persons referred to in subsection (2) or (3) have contravened the provision.

(7) A person does not contravene a provision referred to in subsection (1) by doing or omitting to do something if that act or omission is reasonably necessary to conform to the requirements of the *Workers Compensation Act* or any regulations under that Act.

Administrative penalties

109.2 (1) If the commission finds that a person has contravened a provision referred to in section 109.1 (1), the commission may impose an administrative penalty on the person in an amount that does not exceed the prescribed limit.

(2) If a contravention of a prescribed provision occurs over more than one day or continues for more than one day, separate administrative penalties, each not exceeding the prescribed limit for the purposes of subsection (1), may be imposed for each day the contravention continues.

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

(a) previous contraventions by, administrative penalties imposed on and orders issued to the following:

(i) the person;

(ii) if the person is an individual, a corporation for which the individual is or was a director, officer or agent;

(iii) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;

(b) the gravity and magnitude of the contravention;

(c) the extent of the harm to others resulting from the contravention;

(d) whether the contravention was repeated or continuous;

(e) whether the contravention was deliberate;

(f) any economic benefit derived by the person from the contravention;

(g) the person's efforts to prevent and correct the contravention;

(h) the cost of compliance with the provision contravened;

(i) whether the person self-reported the contravention;

(j) the degree and quality of cooperation during the commission's investigation;

(k) any undue hardship that might arise from the amount of the penalty;

(l) any other matters prescribed by the Lieutenant Governor in Council.

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

Notice of contravention or penalty

109.3 (1) If the commission finds under section 109.1 that a person has contravened a provision referred to in that section or imposes under section 109.2 an administrative penalty on a person, the commission

must give to the person a notice of the decision, and the notice must include reasons for the decision and specify the following:

(a) the contravention;

(b) the amount of the penalty, if any;

(c) the date by which the penalty, if any, must be paid;

(d) the person's right, with respect to the decision, to apply for a reconsideration under section 99 or to appeal it under section 101;

(e) an address to which a request for a reconsideration under section 99 may be sent.

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

Due date of penalty

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

(a) within 30 days after the date on which the notice referred to in section 109.3 (1) is given to the person, or

(b) by a later date ordered by the commission.

Recovery of penalty from ratepayers prohibited

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

Enforcement of administrative penalty

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

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

Revenue from administrative penalties

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

Limitation period

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

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

Part 9 — General

Powers of commission in relation to other Acts

110 The powers given to the commission by this Act apply

(a) even though the subject matter about which the powers are exercisable is the subject matter of an agreement or another Act,

(b) in respect of service and rates, whether set by or the subject of an agreement or other Act, or otherwise, and

(c) if the service or rates are governed by an agreement, whether the agreement is incorporated in, or ratified, or made binding by a general or special Act, or otherwise.

Substantial compliance

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

Vicarious liability

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

Public utilities may apply

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

Municipalities may apply

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

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

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

(a) to submit the matter to the commission,

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

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

Certified documents as evidence

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

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

Class representation

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

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

Costs of commission

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

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

Participant costs

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

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

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

Tariff of fees

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

No waiver of rights

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

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

Relationship with *Local Government Act*

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

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

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

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

(a) a certificate of public convenience and necessity issued under section 46,

(b) an exemption from the application of section 45 granted, with the advance approval of the Lieutenant Governor in Council, by the commission under section 88, and

(c) an exemption from section 45 granted under section 22, only if the public utility meets the conditions prescribed by the Lieutenant Governor in Council.

(3) For the purposes of subsection (2) (c), the Lieutenant Governor in Council may prescribe different conditions for different public utilities or categories of public utilities.

Repealed

122 [Repealed 2004-45-172.]

Service of notice

123 (1) A notice that the commission is empowered or required to give to a person under this Act must be in writing and may be served either personally or by mailing it to the person's address.

(2) If a notice is mailed, service of the notice is deemed to be effected at the time at which the letter containing the notice, properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

Reasons to be given

124 (1) If an application to the commission is opposed, the commission must prepare written reasons for its decision.

(2) If an application is unopposed, the commission may, and at the request of the applicant must, prepare written reasons for its decision.

(3) Written reasons must be made available by the secretary to any person on payment of the fee set by the commission.

(4) [Repealed 2003-46-20.]

Regulations

125 (1) The Lieutenant Governor in Council may make regulations as referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may, for the purpose of recovering the expenses arising out of the administration of this Act in a fiscal year, make regulations as follows:

(a) setting, or authorizing the commission to set, by order of the commission, and to collect fees, levies or other charges from

(i) public utilities, a class of public utility or a particular public utility, and

(ii) other persons to whom a provision of this Act applies or a class of those persons;

(b) setting, or authorizing the commission to set, the fees, levies or other charges payable by the members of the different classes referred to in paragraph (a) in different amounts;

(c) exempting, or authorizing the commission to exempt, a public utility or other person, or a class of either of them, from the payment of a fee, levy or other charge;

(d) authorizing the commission to retain all or part of any fees, levies or other charges collected by the commission under a regulation;

(e) requiring the commission to set a rate for the purposes of section 28 (2.1) and prescribing requirements for the purposes of that section.

(2.1) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations respecting the imposition of administrative penalties, including, without limitation, prescribing

(a) provisions for the purposes of section 109.2 (2),

(b) matters to be considered under section 109.2 (3) before imposing an administrative penalty,

(c) the criteria for determining appropriate administrative penalties, and

(d) different limits on different administrative penalties, including different limits for contraventions by different classes of persons.

(3) The commission may make regulations on a matter for which it is empowered by this Act to make regulations.

Minister's regulations

125.1 (1) In this section, **"minister"** means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(2) and (3) [Repealed 2010-22-72.]

(4) The minister may make regulations as follows:

(a) [Repealed 2010-22-72.]

(b) respecting exemptions under section 22;

(c) and (d) [Repealed 2010-22-72.]

(e) for the purposes of sections 44.1 and 44.2,

(i) prescribing rules for determining whether a demand-side measure, or a class of demand-side measures, is adequate, cost-effective or both,

(ii) declaring a demand-side measure, or a class of demand-side measures, to be cost effective and necessary for adequacy, and

(iii) prescribing rules or factors a public utility must use in making the estimate referred to in section 44.1 (2) (a);

(iv) [Repealed 2010-22-72.]

(f) [Repealed 2010-22-72.]

(g) prescribing factors and guidelines for the purposes of section 58 (2.1) (b), including, without limitation, factors and guidelines to encourage

(i) energy conservation or efficiency,

(ii) the use of energy during periods of lower demand,

(iii) the development and use of energy from clean or renewable resources, or

(iv) the reduction of the energy demand a public utility must serve;

(h) defining a term or phrase used in section 58.1 and not defined in this Act;

(i) identifying facts that must be used in interpreting the definition in section 58.1;

(j)-(n) [Repealed 2010-22-72.]

(o) prescribing standard-making bodies for the purposes of section 125.2 (1) and requirements and matters for the purposes of section 125.2 (3).

(p) [Repealed 2015-42-26.]

(5) In making a regulation under this section, the minister may

(a) make regulations of specific or general application, and

(b) make different regulations for different persons, places, things, measures, transactions or activities.

Adoption of reliability standards, rules or codes

125.2 (1) In this section:

"reliability standard" means a reliability standard, rule or code established by a standard-making body for the purpose of being a mandatory reliability standard for planning and operating the North American bulk electric system, and includes any substantial change to any of those standards, rules or codes;

"standard-making body" means

(a) the North American Electric Reliability Corporation,

(b) the Western Electricity Coordinating Council, and

(c) a prescribed standard-making body.

(2) For greater certainty, the commission has exclusive jurisdiction to determine whether a reliability standard is in the public interest and should be adopted in British Columbia.

(3) The authority must review each reliability standard and provide to the commission, in accordance with the regulations, a report assessing

(a) any adverse impact of the reliability standard on the reliability of electricity transmission in British Columbia if the reliability standard were adopted under subsection (6),

(b) the suitability of the reliability standard for British Columbia,

(c) the potential cost of the reliability standard if it were adopted under subsection (6),

(c.1) the application of the reliability standard to persons or persons in respect of specified equipment if the reliability standard were adopted under subsection (6), and

(d) any other matter prescribed by regulation or identified by order of the commission for the purposes of this section.

(4) The commission may make an order for the purposes of subsection (3)(d).

(5) If the commission receives a report under subsection (3), the commission must

(a) make the report available to the public in a reasonable manner, which may include by electronic means, and for a reasonable period of time, and

(b) consider any comments the commission receives in reply to the publication referred to in paragraph (a).

(6) After complying with subsection (5), the commission, subject to subsection (7), must, by order, adopt the reliability standards addressed in the report if the commission considers that the reliability standards are required to maintain or achieve consistency in British Columbia with other jurisdictions that have adopted the reliability standards.

(7) The commission is not required to adopt a reliability standard under subsection (6) if the commission determines, after a hearing, that the reliability standard is not in the public interest.

(8) Subject to subsection (8.3), a reliability standard adopted under subsection (6) applies as specified in an order made under subsection (6).

(8.1) At the request of the commission, the authority must provide to the commission, in accordance with any directions made by the commission, a report assessing the application of a reliability standard adopted under subsection (6) to a specified person, a class of persons or a person in respect of specified equipment.

(8.2) Subsection (5) applies to a report received by the commission under subsection (8.1).

(8.3) After complying with subsection (5) respecting a report received under subsection (8.1), the commission may, by order, specify that a reliability standard adopted under subsection (6) applies or does not apply to a specified person, a class of persons or a person in respect of specified equipment.

(9) A reliability standard adopted under subsection (6) applies as specified in an order made under subsection (6) or (8.3) despite an exemption issued under section 22 or 88 (3).

(10) The commission may make orders providing for the administration of adopted reliability standards.

(10.1) Without limiting subsection (10), section 43 (1) (a) and (b) (i) applies to a person to whom a reliability standard adopted under subsection (6) of this section applies, as though the person were a public utility.

(11) The commission, on its own motion or on complaint, may

(a) rescind an adoption made under subsection (6), or

(b) adopt a reliability standard previously rejected under subsection (7)

if the commission determines, after a hearing, that the rescission or adoption is in the public interest.

(12) The commission, without the approval of the minister responsible for the administration of the *Hydro and Power Authority Act*, may not set a standard or rule under section 26 of this Act with respect to a matter addressed by a reliability standard assessed in a report submitted to the commission under subsection (3) of this section.

Intent of Legislature

126 If a provision of this Act is held to be beyond the powers of British Columbia, that provision must be severed from the remainder of the Act, and the remaining provisions of the Act have the same effect as if they had been originally enacted as a separate enactment and as the only provisions of this Act.

TAB 2

CARDINAL RULES

OF

LEGAL INTERPRETATION.

COLLECTED AND ARRANGED

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THIRD EDITION

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Sense and Meaning, how collected.

The sense and meaning of an instrument should be collected from the terms used therein, and effect should be given (if possible) to every word, or to every provision contained therein.

The terms of an instrument are to be understood (in the first place) in their plain, ordinary, and popular sense, (in the second place) in any peculiar sense they may have acquired in trade, &c., (in the third place) in any special and peculiar sense pointed out by the context.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus;* every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done."—*Barton* v. *Fitzgerald* (1812), 15 East, 530, at p. 541, Lord Ellenborough, C. J.

"The question in this, and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."—*Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651, at p. 663, Lord Denman, C. J.

"The first question is, whether this is a personal covenant, or is it a covenant by the defendants as a corporate body. It must fall within the one class or the other. Churchwardens and overseers, though they are by statute a corporate body for some purposes, cannot enter [into] such a covenant as this in a corporate character; if not, then the contract must be a personal covenant."—*Furnivall* v. *Coombes* (1843), 5 Man. & G. 736, at pp. 750, 751; 12 L. J. C. P. 265, at p. 269, Tindal, C. J.

"Now, 'in regular turn' must mean something: the expression cannot have been introduced, as the plaintiff's counsel contend, for no purpose."—*Hudson* v. *Clementson* (1856), 18 C. B. 213, at p. 226; 25 L. J. C. P. 234, at p. 237, Crowder, J.

"The marriage settlement of this unlucky lady is no doubt strangely and untechnically framed, but the question is not whether it is agreeable to grammar and correct in form, but what is the intention to be fairly and reasonably collected from the whole document?"—*Spring* v. *Pride* (1864), 4 De G. J. & S. 395, at p. 401, Knight Bruce, L. J.

Subject-Matter.

"Whenever you have to construe a statute or document, you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule."—*Lion Insurance Association* v. *Tucker* (1883), 12 Q. B. D. 176, at p. 186; 53 L. J. Q. B. 185, at p. 189, Brett, M. R.

"Words, however general, may be limited with respect to the subject-matter in relation to which they are used."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626, at p. 628, Lord Halsbury, L. C.

Circumstances and Object.

The purpose of interpreting an instrument is to see what is the intention expressed by the words used.

If from the imperfection of language it is impossible to know what the intention is without inquiring further, then see what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.

"I apprehend that, in construing an Act of Parliament, a deed, will, or whatever other instrument may have to be construed by the Court, I have a right to look to all the circumstances which the parties to the instrument, whether a testator, a donor, or the legislature, who are executing a solemn act, had before them at the time, and were themselves contemplating, as proved, not of course, by any extrinsic evidence, but by evidence afforded by the instruments themselves, and also such matters as can be proved by extrinsic evidence to have been the circumstances which surrounded them, and which may have affected the conclusion at which they arrived."—*Att.-Gen.* v. *Earl of Powis* (1853), Kay, 186, at p. 207, Wood, V.-C.

"The principles of construction of statutes laid down by this House in the present case must have an important effect on those

TAB 3

Canadian Contractual Interpretation Law

SECOND EDITION

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> finally the purpose sought by the parties in using these terms ... .[39] [Underlining in original.]

A contract's purpose is generally not a significant element of the interpretive process under the common law, although it was considered along with text and context in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*.[40]

2.2 A CONTRACT IS TO BE CONSTRUED AS A WHOLE WITH MEANING GIVEN TO ALL OF ITS PROVISIONS

2.2.1 The principle

It is a fundamental precept that contractual interpretation requires an examination of a contract as a whole, not just a consideration of the specific words in dispute.[41] Individual words and phrases must be read in the context of the entire document. "The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context."[42] The rule is so basic that it has aptly been described as a "well-known" principle of contract interpretation.[43]

The corollary of this principle is the precept that meaning must be given to all of the words in a contract:

> To the extent that it is possible to do so, [a contract] should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at p. 66, 25 D.L.R. (4th) 649 at p. 655. The court should strive to give meaning to the agreement and "reject an interpretation that would render

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39 *Frenette v. Metropolitan Life Insurance Co.*, [1992] S.C.J. No. 24, [1992] 1 S.C.R. 647 at 667 (S.C.C.).

40 [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 at paras. 64-66 (S.C.C.), *per* Cromwell J.

41 The first edition of this book was cited with approval on this point in *Hnatiuk v. Court*, [2010] M.J. No. 52, 251 Man.R. (2d) 178 at para. 43 (Man. C.A.).

42 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 at para. 64 (S.C.C.), *per* Cromwell J. See also *Canadian Newspapers Co. v. Kansa General Insurance Co.*, [1996] O.J. No. 3054, 30 O.R. (3d) 257 at 270 (Ont. C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 553 (S.C.C.); *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1999] O.J. No. 3290, 45 O.R. (3d) 417 at para. 9 (Ont. C.A.); and *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083, 85 O.R. (3d) 254 at para. 24 (Ont. C.A.), which are to a similar effect.

43 *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba)*, [2003] M.J. No. 191, [2003] 9 W.W.R. 385 at para. 12 (Man. C.A.), citing *National Trust Co. v. Mead*, [1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 (S.C.C.).

> of the agreement as a whole, and in particular in the light of the other termination provision in clause 20.[64]

Thus a contextual reading of the contract as a whole helped to eliminate an inconsistency that arose from the wording of the text.

2.2.6 The precept in Québec

In Québec, the precept that a contract is to be read as a whole with meaning given to all of its provisions is essentially identical to its common law counterpart. Articles 1427 and 1428 of the *Civil Code of Québec* specify as follows:

> 1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.
>
> 1428. A clause is given a meaning that gives it some effect rather than one that gives it no effect.[65]

The precept is repeatedly referred to in the doctrine and in case law. One text refers to article 1427 as creating "la règle de l'examen global" (the rule of global examination), which requires a contract to be considered in light of its overall "architecture", on the basis that no one provision of a contract reveals its meaning without a reading of the contract as a whole.[66] Another text emphasizes that it is necessary to conceptualize a contract as a whole, such that clauses are not interpreted separately without reference to other clauses.[67] The Québec Court of Appeal has also emphasized that contractual provisions must be interpreted in their proper context, being the complete contents of the contract.[68] It has rejected a proposed interpretation that was entirely decontextualized and failed to accord with the spirit of the provisions in dispute or with the provisions of the contract as a whole.[69]

2.3 THE FACTUAL MATRIX

2.3.1 The principle

Contractual interpretation is all about giving meaning to words in their proper context, including the surrounding circumstances in which a contract has arisen — usually referred to as the "factual matrix". Because language always draws meaning from context, the factual matrix constitutes an essential element of contractual interpretation in all cases, even when there is no ambiguity in the language.

---

64 *Ibid.*, at 66 S.C.R.

65 *Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1427 and 1428.

66 François Gendron, *L'interprétation des contrats* (Montréal: Wilson & Lafleur, 2002) at 83-84.

67 Pierre-Gabriel Jobin, *Les Obligations*, 6th ed. (Cowansville, QC: Yvon Blais, 2005) at 448.

68 *Peacock v. Adessky*, [2009] J.Q. no 14638 at para. 36 (Qué. C.A.).

69 *Sulitzer v. Banque Nationale du Canada*, [2007] J.Q. no 14196 at para. 44 (Qué. C.A.).

from their context, evidence of the circumstances surrounding the making of a contract has been regarded as admissible in every case."[86] Similarly:

> A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made ... .[87]

If the language of a contract cannot be properly understood outside the context in which that language is placed, the factual matrix must be part of the interpretive process in every case, even if the language viewed on its own is not ambiguous.

2.3.3 The broad scope of what may be considered as part of the factual matrix

The scope of what may be considered within the rubric "factual matrix" is quite broad. It always involves a highly contextual analysis, and can amount to a very detailed examination of the facts depending on the particular circumstances of the case.

In general terms, the factual matrix clearly includes what the great American judge Benjamin Cardozo long ago called the "genesis and aim of the transaction".[88] As expressed by the British Columbia Court of Appeal: "The law is clear that surrounding circumstances must be taken into account and one of those circumstances is the object and purpose the parties were seeking to attain by their agreement."[89]

Yet the factual matrix includes more than simply the purpose of a contract. The factual matrix is sometimes described as the "background" for the contract:

> The factual matrix is the *background* of relevant facts that the parties must clearly have been taken to have known and to have had in mind when they

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86 *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33, 52 O.R. (3d) 97 at para. 23 (Ont. C.A.) (citations omitted). See also *Eco-Zone Engineering Ltd. v. Grand Falls — Windsor (Town)*, [2000] N.J. No. 377, 5 C.L.R. (3d) 55 at para. 10 (Nfld. C.A.); *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.*, [2004] B.C.J. No. 1606, [2004] 11 W.W.R. 427 at para. 10 (B.C.C.A.); and *Dunn v. Chubb Insurance Co. of Canada* [2009] O.J. No. 2726, 97 O.R. (3d) 701 at footnote 4 (Ont. C.A.). However, see also *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, [2006] B.C.J. No. 2652, [2006] 11 W.W.R. 381 at paras. 23-26 (B.C.C.A.), which held that recourse to extrinsic evidence in aid of the interpretation of a contract is a last resort to be invoked only when there is an ambiguity rendering the parties' intentions incapable of being discerned from the language of the agreement itself.

87 *Dumbrell v. Regional Group of Companies*, [2007] O.J. No. 298, 85 O.R. (3d) 616 at para. 54 (Ont. C.A.).

88 *Utica City National Bank v. Gunn*, 118 N.E. 607 at 608 (N.Y. 1918).

89 *Canada Deposit Insurance Corp. v. Commonwealth Trust Co. (in Liquidation)*, [1997] B.C.J. No. 2302, [1998] 1 W.W.R. 484 at para. 10 (B.C.C.A.).

> composed the written text of their agreement. It can throw light on what the parties must have meant by the words they chose to express their intention. ...
>
> .....
>
> ... The factual matrix is the *background* which may deepen an understanding of what the parties meant by the language they used ... .[90] [Emphasis added.]

Since the point of the factual matrix is to understand the relevant background facts at the time of contracting, the Alberta Court of Appeal has suggested that a better phrase than "factual matrix" might be a phrase from the law of wills, the "armchair rule":

> That rule lets the court see what the authors of the contract knew when they wrote it, in order indirectly to assist in resolving any difficulties in what certain words of the contract refer to. For example, a contract may contain unclear references to other people, or to things. The background knowledge may help to decide who or what was referred to. The expression quoted comes from the law of wills, and suggests that often one cannot construe a contract without knowing the facts which the parties knew when they contracted (not later). The rule under discussion is rarely called the "armchair rule" in contract law, but that expression explains more than such vague or misleading labels as the "factual matrix".[91]

The precise scope of the factual matrix depends on the particular circumstances of the case, and it can be hugely detailed. The examples are many and varied. In a case involving a dispute over which parties were bound by an oral settlement agreement, the factual matrix included the fact that two corporate entities had no assets and that an agreement binding only them would not achieve the purpose of bringing the litigation to an end.[92] In a case involving a dispute over the territory covered by a mining licence, the factual matrix was held to include the licence applications, evidence of the insertion on the applications of certain dimensions by a government official, evidence of the circumstances by which the licence applicant had altered the sketch of the dimensions in the presence of government officials, and a letter from the licence applicant stating that he intended to apply for a licence for a certain specified area.[93] In a case in which the issue was whether a release by a bank in favour of a wife who had guaranteed her husband's debts included a release of an action against her by the bank under the former *Bankruptcy Act* following her husband's bankruptcy (which occurred after the release was executed) in respect of the conveyance of certain assets, the factual matrix was held to include the facts that: when the release was executed the stability of the husband's proposal in bankruptcy was "shaky at best and its future, doubtful"; the husband had fallen

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90 *Glaswegian Enterprises Ltd. v. B.C. Tel Mobility*, [1997] B.C.J. No. 2946 at paras. 18-20, 49 B.C.L.R. (3d) 317 at 323-24 (B.C.C.A.).

91 *Gainers Inc. v. Pocklington Financial Corp.*, [2000] A.J. No. 626, 81 Alta. L.R. (3d) 17 at para. 21 (Alta. C.A.).

92 *Petro-Canada v. Disco Oil & Gas Ltd.*, [1994] B.C.J. No. 1346, 96 B.C.L.R. (2d) 174 at paras. 9-10 (B.C.C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 449 (S.C.C.).

93 *King Island Clay Ltd. v. Upton*, [1995] B.C.J. No. 314, 4 B.C.L.R. (3d) 80 at paras. 35-36 (B.C.C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 169 (S.C.C.).

TAB 4

Federal Court | Cour fédérale

Date: 20110929

Docket: T-514-11

Citation: 2011 FC 1120

Ottawa, Ontario, September 29, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BELL CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA, MINISTER OF INDUSTRY AND ROGERS COMMUNICATIONS INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under the *Federal Courts Act*, RSC 1985, c. F-7 for judicial review to: (a) quash and set aside the publication in the *Canada Gazette* on 19 March 2011 as Gazette Notice No. DGTP-002-11 (Notice) by the Minister of Industry (Minister) of the 26 January 2011 petition (Petition) by Rogers Communications Inc. (Rogers) pursuant to subsections 12(1) and 12(4) of the

Telecommunications Act, S.C. 1993, c. 38 (Act); and (b) prohibit the Governor in Council (Cabinet) from considering the Petition.

BACKGROUND

[2] In 2002, the Canadian Radio-television and Telecommunications Commission (CRTC) issued Decision 2002-34, which permitted Incumbent Local Exchange Carriers (ILECs), including Bell Canada (Bell), to charge more than a permitted maximum tariff. Though these ILECs were permitted to charge above the tariff, the excess amount was to be tracked in a separate account (Deferral Account) and segregated from other funds. The CRTC retained the authority to determine the use of these funds at a later date.

[3] On 14 December 2006, by Order in Council P.C. 2006-1534 SOR/2006-355, the Cabinet gave the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunication Policy Objectives* (Policy Direction) under section 8 of the Act. Among other things, the Policy Direction directed the CRTC to "rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and when relying on regulation, use measures that [...] interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives."

[4] Beginning in 2006, the CRTC issued a series of decisions which established principles for the distribution of the Deferral Account monies. The CRTC decided in Decision 2006-9 that the Deferral Account funds would be used for two purposes: (1) improving access for people with disabilities; and (2) extending broadband internet services into rural and remote locations. Any excess funds would be returned to customers as rebates. Several parties appealed that decision to the

Federal Court of Appeal: Bell appealed the portion of the decision requiring it to return a portion of the funds as rebates to customers, while other parties appealed the requirement that the funds be used for broadband expansion. Ultimately, the Supreme Court of Canada, in *Bell Canada v Bell Aliant Regional Communications* 2009 SCC 40, held that the CRTC's allocation of funds for broadband expansion, increasing access for people with disabilities, and rebates to customers was valid, as the allocation of Deferral Account funds is within the CRTC's rate-setting authority.

[5] In Decisions 2006-9 and 2007-15 the CRTC had rejected the proposal that the Deferral Account funds should be available to all telecommunications companies and awarded on the basis of a competitive bidding process. This competitive bidding process, Rogers had submitted, would fulfill the principle of competitive neutrality which the Telecommunications Policy Review Panel had recommended the CRTC adopt in its 2006 Final Report. Rather than use a competitive bidding process which it felt would "add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden," the CRTC opted for the use of a proposal system. In the proposal system, the CRTC would examine proposals submitted by the ILECs for the use of the Deferral Account funds and approve or disapprove of them based on their compliance with the conditions established in Decision 2006-9. In Decision 2007-15, the CRTC approved the use of Deferral Account funds for Broadband expansion into 112 communities in Ontario. In Decision 2008-1, the CRTC approved several proposals to expand accessibility to telecommunications with Deferral Account funds and also set additional principles for how additional communities would be selected for expansion, the implementation of least-cost technology, and the recovery of uneconomic costs.

[6] In 2009, Bell filed a proposal with the CRTC to use $303.6 million in Deferral Account funds to expand broadband access to 112 communities in Ontario. Bell proposed expanding broadband coverage using wireless high-speed packet access (HSPA+) technology. Among others, Rogers opposed this proposal, in part because Rogers had already implemented HSPA broadband technology in a number of these communities. Rogers argued that, for the CRTC to permit Bell to expand its network using HSPA+ technology would not in fact expand broadband access, and so was contrary to the principles established by the CRTC in Decisions 2006-9, 2007-15 and 2008-1 (the Deferral Account Decisions).

[7] In CRTC Decision 2010-637, the Commission rejected Bell's proposal. In that decision, the CRTC approved the use of $306.3 million of Deferral Account funds for expanding broadband internet services to 112 communities. However, rather than using the wireless HSPA+ technology, the CRTC required Bell to complete the expansion using wireline Digital Subscriber Line (DSL) technology. The remaining balance in the Deferral Account fund of $277 million would be returned to consumers as a rebate. Bell proposed to roll out this technology over a four-year period, beginning with 15 communities in 2011 and completing the expansion by 2015.

[8] In 2010, given advances in technology, Bell filed an application with the CRTC to vary Decision 2010-637, and to allow Bell to complete the expansion into the approved communities using improved wireless technology (HSPA+). Rogers opposed this application to vary, saying Bell's proposal did not comply with the Guidelines established in the Deferral Account Decisions and violated the Policy Direction. The CRTC in Decision 2010-805 approved Bell's proposal to complete the expansion using wireless HSPA+ technology and noted that

> it had rejected this idea in both Telecom Decisions 2006-9 and 2007-50 (*sic*), since it would add a significant layer of complexity, delay

> the implementation of broadband expansion, and result in substantial administrative and regulatory burden. The Commission considers that these reasons continue to be valid.

[9] In response, on 26 January 2011, Rogers filed the Petition with the Clerk of the Privy Council under subsection 12(1) of the Act. In the Petition, Rogers asks the Cabinet to vary Decision 2010-805 to reduce the amount of deferral account funds approved to only the amount necessary to cover the uneconomic portion of Bell's expansion into the first 15 communities in its proposal. Rogers also asks the Cabinet to vary Decision 2010-805 to permit a competitive bidding process for expansion into the remaining 97 approved communities.

[10] Having received the Petition from Rogers, the Minister published the Notice in the 19 March 2011 issue of the *Canada Gazette*. The Notice informs the public that the Minister has received the Petition, that the Petition and the supporting documents can be obtained electronically on Industry Canada's Spectrum Management and Telecommunications website, and that submissions regarding the Petition must be made within thirty days of the publication of the Notice in the *Gazette*. The publication of this Notice is what Bell seeks to quash in this application for judicial review. Bell also seeks to prohibit Cabinet from considering the Petition.

DECISION UNDER REVIEW

[11] Bell seeks judicial review to quash the Notice published by the Minister in the *Canada Gazette*. The Notice provides in relevant part as follows:

> Notice is hereby given that a petition from Rogers Communications Partnership (hereinafter referred to as Rogers), has been received by the Governor in Council (GIC) under section 12 of the *Telecommunications Act* with respect to a decision issued by the Canadian Radio-television and Telecommunications Commission (CRTC), concerning the use of wireless technology and deferral

> account funds for extending broadband service to approved communities.
>
> Subsection 12(1) of the *Telecommunications Act* provides that, within one year after a decision by the CRTC, the GIC may, on petition in writing presented to the GIC within 90 days after the decision, or on the GIC's own motion, by order, vary or rescind the decision or refer it back to the CRTC for reconsideration of all or a portion of it.
>
> In its petition, dated January 26, 2011, Rogers requests that the GIC vary Telecom Decision CRTC 2010-805, *Bell Canada – Applications to review and vary certain determinations in Telecom Decision 2010-637 concerning the use of high-speed packet access wireless technology and the deferral account balance*. The reasons for this request are included in Rogers' petition.
>
> Submissions regarding this petition should be filed within 30 days of the publication of this notice in the *Canada Gazette*. All comments received will be posed on Industry Canada's Spectrum Management and Telecommunications Web site at www.ic.gc.ca/spectrum.

[12] Bell also seeks an order of prohibition preventing the Cabinet from considering and determining Rogers's Petition.

ISSUES

[13] Bell raises two basic issues in this application:

1. Whether the Minister had jurisdiction to publish the Notice in the *Canada Gazette*;
2. Whether the Cabinet has jurisdiction to hear Rogers's Petition.

STATUTORY PROVISIONS

[14] The following statutory provisions of the Act are relevant to these proceedings:

> **In light of all of the above**, the Commission finds that Bell Canada's HSPA+ wireless broadband proposal is consistent with its determinations in the Deferral Account decisions. The Commission therefore **approves** the revised proposal. [Some emphasis added.]

[85] As Bell and Canada point out, the Petition challenges and seeks a variance of the CRTC's determinations in Decision 2010-805on the impact of approving Bell's new proposal on wireless competition, the costs and benefits of implementing a competitive bidding process and the consequent approval of Bell's new wireless HSPA+ technology proposal.

[86] Simply put, paragraphs 21 to 24 of the Decision are the subject matter of the Petition.

Bell's Arguments

[87] Bell has sought to persuade the Court that the above interpretation of the Petition, Decision 2010-805, and the background decisions is not correct for various reasons. In my view, none of the objections put forward by Bell can withstand scrutiny.

[88] First, Bell maintains that the "the CRTC had already fully considered the competitive bidding issue in Decisions 2006-9 and 2007-15." As a matter of law, however, it is my view that while the CRTC may refer to and take guidance from its earlier decisions, those decisions cannot dictate its subsequent decisions. The CRTC is not bound by precedent and has a legal obligation not to fetter its discretion. As stated in Macauley and Sprague's *Practice and Procedure Before Administrative Tribunals*:

> … the notion of *stare decisis* is not applicable in the administrative sphere. **Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obligated not to do so.** [emphasis added]

[89] The principle that an administrative tribunal cannot use its previous decisions to fetter its discretion was established in *Hopedale Developments Ltd. v Oakville (Town)* (1965), 47 DLR (2d) 482 (ONCA) at 486. The Ontario Court of Appeal held in that case that it would have been an error of law for the Ontario Municipal Board to use precedent to limit the number of issues that it needed to address. Administrative tribunals are permitted to rely on principles articulated in previous decisions as long as the tribunal gives "the fullest hearing and consideration to the whole problem before it."

[90] The prohibition on exclusive reliance by an administrative tribunal on previous decisions includes not only factual and policy decisions but also legal determinations and is essential to ensure that administrative tribunals have the flexibility to respond to new circumstances on a case-by-case basis. The need for flexibility is particularly acute in the case of policy and factual determinations, such as those at issue in Decision 2010-805 and the Petition.

[91] The CRTC also did not have before it in its previous decisions Bell's new wireless HSPA+ technology proposal, which Bell characterized as establishing new facts, resulting in a new application. In my view, the CRTC could not have considered competitive bidding in light of these new facts in its previous decisions anymore than the CRTC could have considered Bell's new wireless HSPA+ technology in its previous decisions. The relevant facts, quite simply, were not previously before the CRTC.

[92] Therefore, in my view, the CRTC cannot, as a matter of law, have "fully considered" in previous decisions whether competitive bidding should be used to allocate Deferral Account funds in light of Bell's new wireless HSPA+ technology proposal.

[93] Second, Bell argues that consideration of a competitive bidding process was not "properly before the CRTC in the Decision" because Rogers "intervened" and raised this issue "over Bell's objection." In support of this proposition, Bell cites jurisprudence on the ability of the interveners to raise new issues at trial and on appeal in the courts. In my view, this jurisprudence has no application to administrative proceedings. Even if it did, Rogers, Barrett and Videotron – all of whom requested a competitive bidding process should Bell's application be granted – were not interveners; they were interested parties to Decisions 2010-637 and 2010-805, entitled to respond to Bell's application based on factual, policy, and legal grounds relevant to the CRTC's assessment of whether Bell's new wireless HSPA+ technology proposal satisfied the CRTC's criteria for Deferral Account funding. Opposing parties' submissions focused specifically on these criteria, including in particular the objectives of extending service to underserved communities, competitive neutrality and least-cost service provision, and it is in this context that the CRTC's addressed these arguments.

[94] I agree with Rogers and Canada that there was also no prohibition under the former *CRTC Telecommunications Rules of Procedure* (and there is no prohibition under the new *CRTC Rules of Procedure*) on an interested party to a CRTC proceeding to raise policy, factual or legal arguments that have not been expressly identified by an applicant in the application. Rules 13 and 27 of the former *CRTC Telecommunications Rules of Procedure*, cited by Bell, simply provide the CRTC with the discretion to require parties to clarify issues in dispute or to order amendments necessary

for determining the real question in issue. No such steps were taken by the CRTC in the Decision 2010-805 proceeding.

[95] Nor was there any requirement, in my view, for Rogers or other interested parties to "formally request" a variance of Decisions 2006-9 and 2007-15 in their submissions in the Decision 2010-805 proceeding or by separate application. The submissions of opposing parties identify competitive neutrality and competitive bidding as factors that the CRTC needed to consider in its assessment of whether Bell's new wireless HSPA+ technology proposal was consistent with its criteria for Deferral Account funding.

[96] There is also no question, in my view, that the CRTC had the authority to order the implementation of a competitive bidding process in the Decision had it determined that this was necessary to ensure competitive neutrality and/or least-cost provision of service. In this regard, section 60 of the Act especially authorizes the CRTC to "grant the whole or any portion of the relief applied for in any case, and may grant any of the relief in addition to or in substitution for the relief apply for as if the application had been for that relief."

[97] Bell's third proposition is that "the text of Decision 2010-805 does not suggest that the CRTC intended to render any new decision on competitive bidding." As I have said previously, it is my view that the Decision clearly and unequivocally makes a decision on this issue. In the Decision, the CRTC analyzed and determined the appropriateness of implementing a competitive bidding process, as it was required by law to do, referencing its earlier determinations that such a process would result in complexity, delay and substantial administrative and regulatory burden and concluding that "these reasons continue to be valid."

TAB 5

BRITISH COLUMBIA LAW REPORTS

SECOND SERIES

VOLUME 66

(Cited 66 B.C.L.R. (2d))

CARSWELL

Thomson Professional Publishing

BRITISH COLUMBIA LAW REPORTS

SECOND SERIES

Reports of Selected Cases from the Courts of British Columbia and Appeals.

[Indexed as: **Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)**]

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.
v. BRITISH COLUMBIA UTILITIES COMMISSION
and ATTORNEY GENERAL OF BRITISH COLUMBIA

Court of Appeal
Hutcheon, Cumming and Hinds JJ.A.

Heard – February 12 and 13, 1992.
Judgment – March 26, 1992.

Public utilities – Rates and charges – Changes – Utilities Commission Act empowering commission to determine fair and reasonable return upon appraised value of property of regulated utilities – Commission having duty to set rates to allow opportunity to earn that return.

The appellant was a small special purpose utility which was the sole supplier of electricity to approximately 192 residential customers. In May 1990 the appellant applied to the British Columbia Utilities Commission for a rate increase of 7.32¢ per kW.h on a rate of 8.65¢ per kW.h. In July 1990 the commission allowed an interim increase of 3.7¢ per kW.h. Following a public hearing the commission approved an increase of 3.77¢ per kW.h, but declined to permit the immediate full implementation of the increase and instead directed that it be phased in by increases of 1.51¢ in July 1990, 1.51¢ in May 1990 and 0.75¢ in May 1992. The appellant brought an appeal against the phase-in provisions of the decision.

Held – Appeal allowed; matter remitted to commission.

The *Utilities Commission Act* empowers the commission to determine what is a fair and reasonable rate of return upon the appraised value of the property of the regulated utilities, but, having done so, requires the commission to set rates so as to allow recovery

of a rate which permits an opportunity to earn that return. Here, the commission correctly exercised its discretion to determine what a just and reasonable return was, but wrongly failed to permit the appellant to charge a rate which gave it an opportunity to earn that return. The balancing of interests required by the Act was performed by the commission when it settled the rate base, fixed the rate of return and determined the costs of operation allowable for rate-making purposes. In directing the three-year phase-in, the commission was not balancing interests or, if it was purporting to do so, it acted improperly. If it wished to avoid "rate shock" to the appellant's customers by a phase-in period, it would have to do so in a way which met the requirements of the Act.

Cases considered

British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission, [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 – considered.

British Columbia Hydro & Power Authority v. Westcoast Transmission Co., [1981] 2 F.C. 646, 36 N.R. 33 (C.A.) [leave to appeal to S.C.C. refused 37 N.R. 540, (sub nom. *British Columbia Petroleum Corp. v. Canada (National Energy Board)*) 38 N.R. 87] – referred to.

California-Pacific Utilities Co., Re, 52 P.U.R. 3d 446 (1964) – considered.

Pacific Telephone & Telegraph Co., Re, 65 P.U.R. 3d 517 (1966) – considered.

Statutes considered

Public Utilities Act, R.S.B.C. 1948, c. 277
- s. 2(1) – referred to.
- s. 16(1) – referred to.

Utilities Commission Act, S.B.C. 1980, c. 60
- s. 65 [am. 1983, c. 10, s. 21 (Sched.)] – considered.
- s. 66(1)(*a*) – considered.
- s. 66(1)(*b*) – considered.
- s. 115 – referred to.
- s. 118 – referred to.

Water Act Amendment Act, S.B.C. 1929, c. 67 – referred to.

APPEAL from order of British Columbia Utilities Commission.

Chris W. Sanderson and *Barbara Cornish*, for appellant.
Gordon A. Fulton, for respondent B.C. Utilities Commission.
Patrick G. Foy, for respondent Attorney General of British Columbia.

(Doc. Vancouver CA013604)

March 26, 1992. The judgment of the court was delivered by

CUMMING J.A.:–

DECISION APPEALED FROM

1 This is an appeal from O. G-11-91 of the British Columbia Utilities Commission (the "commission") pronounced January 30, 1991 reaffirming the terms of O. G-77-90, made October 17, 1990, which permitted the appellant utility, Hemlock Valley Electrical Services Ltd. ("HVES"), to

increase the rate it charges for the supply of electrical services, but ordered that the rate base costs be phased in over a period of three years.

2 On March 7, 1991, pursuant to s. 115 of the *Utilities Commission Act*, S.B.C. 1980, c. 60, Toy J.A. granted leave to appeal to this court and directed that the operation of commission O. G-11-91 be stayed upon terms to which further reference will later be made.

FACTS

3 HVES, a wholly owned subsidiary of Hemlock Valley Resorts Inc., is a small, special purpose utility which is the sole supplier of electrical service to a group of approximately 192 residential customers living in a single community located around the Hemlock Valley ski hill in the lower mainland of British Columbia. HVES also provides service to the ski hill itself.

4 HVES was incorporated in 1979 and on June 20, 1980 was granted a certificate of public convenience and necessity by O. C-23-80 of the British Columbia Energy Commission, the predecessor of the present commission.

5 On November 13, 1982 HVES filed a rate application with the commission (the "1982 application"). A public hearing was held on June 7, 1983 and the commission rendered its decision on July 8, 1983 (the "1983 decision").

6 At that time HVES' operations were described as follows:

> Hemlock is a subsidiary of Hemlock Valley Recreations Ltd. ("Hemlock Recreations"), which company owns and leases land in the Hemlock Valley of the Lower Mainland of British Columbia for year-round recreational use. Hemlock provides underground electric service to residential consumers and to Hemlock Recreations for use in a ski lodge, lifts and a maintenance area; to Hemlock Property Management Ltd. for residential use on residential properties; and to Hemlock Valley Sanitary Service Ltd. for a sewer system serving the recreation area. All three companies are wholly owned subsidiaries of Hemlock Recreations.

7 In the 1983 decision the commission declined to allow HVES a return on its rate base and ordered that electrical rates be set at 11.5¢ per kW.h with a $15 per month minimum charge, effective July 1, 1983. The commission noted:

(a) the Hemlock recreational area was still in the developmental stage;

(b) the development had been materially affected by a downturn in the provincial economy;

(c) HVES had taken significant steps to reduce the cost of power and improve the reliability of service through the interconnection with B.C. Hydro;

(d) undertakings were given in the prospectus of Hemlock Valley Estates Limited indicating that a purchaser of property could expect that all services would have been completed and paid for by the developer from its own resources.

8 The commission concluded that in the circumstances of HVES a reasonable approach to rates would be based on a break-even approach between revenue and expenses.

9 In its decision of October 17, 1990 the commission said of the 1983 decision:

> It is clear that in the 1983 decision the interdependency of electric and other services with the resort enterprise at Hemlock Valley was fully understood. It is also clear that the commission felt some consternation about the 7.69 per cent negative return on rate base flowing from the 1980 decision. It was also apprehensive that the continued existence of Hemlock Valley as a going concern was being "materially affected by the downturn in the provincial economy." Moreover, it was looking at the changeover from diesel generators to a tie-line with B.C. Hydro. The change in source of power was unquestionably correct in the long-term, but it imposed an annual amortization cost of $98,840.18 for the years immediately ahead. That addition of nearly $100,000 per year materially distorted the profit and loss statement. In the circumstances, the commission, in its 1983 decision, chose to ignore return on rate base as an appropriate means of fixing fair and reasonable rates, and chose instead a pragmatic break-even approach between revenue and expenses. It also added a small allowance for contingencies. Management of the utility was evidently prepared to accept this approach.

10 By commission O. G-65-83, dated August 23, 1983, HVES was again ordered to amend its rates to reflect the sale of a portion of its electric utility plant to B.C. Hydro.

11 On July 10, 1984 HV Recreations, the parent of HVES, went into receivership. HV Recreations remained in receivership until January 15, 1987 when Skipp L.J.S.C. (as he then was) approved the sale of the assets of HV Recreations, including the HVES shares, to one Michael Robbins or his assignee. Sometime after January 15, 1987 the HVES shares were transferred to Hemlock Valley Resorts Inc. ("HV Resorts"). HV Resorts remains the sole shareholder of HVES. Throughout 1987 and 1988 there were various changes in the ownership of HV Resorts and on October 27, 1988 its shares were acquired by Mr. Joseph Peters. There has been no

change in the ownership of the assets or shares of HV Resorts since that date.

12 In 1984 and again in 1986 increased rates were approved to reflect, firstly, an increase in B.C. Hydro's water rental fees and, secondly, an increase in the cost to HVES of purchasing power from B.C. Hydro.

13 As of the spring of 1990 the rate being charged by HVES was 8.65¢ per kW.h. That rate had been in effect since September 26, 1986.

14 On May 31, 1990 HVES applied to the commission to increase its tariff rates by 7.32¢ per kW.h, an 84.6 per cent increase. The reasons given were to permit the recovery of recently approved rate increases to B.C. Hydro, forecast operating costs and a return on rate base. In the 1990 application, HVES proposed a rate base of $366,511 with a 13 per cent return on the debt component and a 15 per cent return on the equity component of that rate base.

15 Prior to a public hearing the commission, by O. G-58-90, ordered that effective July 1, 1990 HVES be allowed an interim increase of 3.7¢ per kW.h in its rates to permit the recovery of the increased cost of purchased power from B.C. Hydro and increased operating costs. The operative part of that order read:

> 1. The Rate Base costs included in the Application will not form part of the interim increase allowed in item No. 2 of this Order at this time.
>
> 2. The Commission will accept, subject to timely filing, effective July 1, 1990, an amendment to its Electric Tariff Rate Schedule incorporating an increase of 3.70 cents/kW.h over existing rates on an interim basis, with the interim increase subject to refund with interest calculated at the average prime rate of the bank with which HVES conducts its business.
>
> 3. HVES, by way of a Customer Notice, is to inform each customer, as soon as possible, of the application before the Commission, the approved interim increase and the effect on average annual billings. HVES is to provide the Commission with a copy of the Customer Notice.

16 On August 2, 1990 the commission directed that a public hearing commencing September 24, 1990 be held in respect of HVES' application of May 31, 1990 and gave directions with respect to notice of the hearing and participation by intervenors and interested persons intending to participate in the public hearing.

17 The Hemlock Valley Ratepayers Association intervened and, we were advised, played a significant role at the hearing. Its submissions covered many areas, correcting a number of statements in the application and disputing a number of forecasts. Among other things, the rate base

component in the application was opposed on the basis that the utility systems were fully paid for by the developers.

18 The commission received evidence of complaints of unsatisfactory service, inadequate HVES accounting documentation, concerns about paying for the recreational commercial venture through utility payments (commercial power use is unmetered), detailed comments on HVES' proposed operating and maintenance expenses, comparisons to residential rates in other areas, and other matters.

19 Following the public hearing on September 24 and 25, 1990, by commission O. G-77-90 dated October 17, 1990, the commission issued a decision (the "original decision") with respect to the 1990 application.

20 The operative part of O. G-77-90 reads:

> 1. The Rate Base and Revenue Requirement for the Test Period are set out in Schedules contained in the Decision.
>
> 2. The Commission will accept, subject to timely filing, amended Electric Tariff Rate Schedules which confirm to the terms of the Commission's October 17, 1990 Decision.
>
> 3. HVES is to proceed with refunds to its customers of record on and after July 1, 1990, where necessary. Such refunds are to include interest calculated as specified in O. G-51-90.
>
> 4. HVES will comply with the several directions incorporated in the Commission Decision.

I have appended as App. A to these reasons [pp. 25-30] the schedules referred to in para. 1 of the commission order.

21 By the original decision the commission declined to permit the full implementation of the approved rate increase immediately but instead directed that it be phased in by increases of 1.51¢ per kW.h effective July 1, 1990, and 1.51¢ per kW.h and 0.75¢ per kW.h effective May 1, 1991 and May 1, 1992 respectively.

22 It is this rate adjustment phase-in which is the principal focus of this appeal.

23 By letter dated November 8, 1990, HVES requested that the commission reconsider certain aspects of the original decision pursuant to s. 114 of the Act on the basis that:

(a) Reconsideration was appropriate because HVES had not been provided with an opportunity to deal with the phase-in issue in its rate application;

(b) Once the commission had determined that there was a rate base and that a 13 per cent return on it was "just and reasonable," pursuant to the Act, the commission was obliged to permit HVES an opportunity to recover sufficient revenue to capture that return.

24 On January 30, 1991, by O. G-11-91, the commission ordered that the request by HVES to vary O. G-77-90 be denied and that HVES was to proceed with refunds to customers and to comply with all other directions in that order.

25 The operative part of O. G-11-91 reads:

> NOW THEREFORE the Commission orders as follows:
>
> 1. The Request, by HVES to vary the October 17, 1990 Commission Decision and Order No. G-77-90, is denied and the Commission's Reasons for Decision is attached as Appendix A.
>
> 2. The Commission reaffirms and orders HVES to proceed with refunds to customers along with other directions incorporated in its October 17, 1990 Decision and Order No. G-77-90.

26 It is from O. G-11-91 that this appeal is taken.

GROUNDS OF APPEAL

27 As set out in the appellant's factum the grounds of appeal are:

> that the Commission erred in pronouncing Order No. G-11-91, which reaffirmed Commission Order No. G-77-90 when Order No. G-77-90 contained an error in law . . . in that the Order:
>
> (a) failed to permit HVES the opportunity to recover a portion of its rate base costs over three years notwithstanding that the Commission had determined that that portion of its rate base costs was necessary for the establishment of rates which were just and reasonable under the *Utilities Commission Act*, S.B.C. 1980, c. 60 (the "Act");
>
> (b) required a refund of monies which the Commission had determined were necessary to permit HVES an opportunity to receive a just and reasonable rate under the Act.

REASONS FOR THE DECISIONS OF THE COMMISSION

1. *Original Decision*

28 In the original decision of October 17, 1990, under the heading "Determination of Rate Base," the commission, after reviewing the 1983 decision, went on to say:

> This division of the commission considers that the 1983 decision was a practical decision to tide the enterprise at Hemlock Valley over a particularly difficult period. Sooner or later, however, longer-term prospects must be faced squarely. The tie-line has been amortized over five years. Evidence

(Exs. 14 through 21) clearly indicates that recovery of plant expenditures was anticipated through utility rates. *Therefore the commission believes that a return to more traditional rate-making practice is justified.*

It was proposed to the commission by the intervenors at the hearing that rate base should not be recognized. The cornerstone of rate base is appraised value of utility property, which is usually taken to be original cost of plant. The commission cannot, by a stroke of the pen, eliminate the appraised value of the property; to do so would be confiscation of property . . .

And concluded:

The commission has considered alternative calculations for rate base and concludes that no material difference results from any refinements which might be made. Therefore, the commission accepts the company's evidence, and finds the rate base to be $366,511 for the test period.

29 The commission then continued:

4.2 *Capital Structure*

The company currently has no viable capital structure of its own. Its financing has been by way of loans from the parent company. The applicant proposes a deemed 50/50 per cent debt/equity ratio in this application. It is a frequent practice of regulatory tribunals to use a notional capital structure. While 50 per cent equity is much higher than would be usual for utilities in general, the higher proportion of equity in this case can be considered as reasonable, bearing in mind the relative risks in the case of the company.

4.3 *Return on Rate Base*

The company has proposed a return of 13 per cent on the debt component, and 15 per cent on the equity component of the rate base. Standing alone, these figures certainly fall within a reasonable range in today's market. Nevertheless, the commission considers it essential to consider the particular circumstances of the company in this decision. While it is true that risky investments typically command higher returns, that position considers primarily the potential investors' point of view in placing funds at the utility's disposal. From the existing shareholders' point of view, the realization of an allowable rate of return depends upon the ability of management to run an efficient organization, and for external factors to favourably affect the prosperity of the company. Bearing in mind the interrelationship of the resort and utility elements at Hemlock, and the current circumstances of the utility, the commission cannot accept a return on equity for rate-making purposes of 15 per cent. *For the foregoing reasons, the commission believes that a 13 per cent return on debt and a 13 per cent return on equity are both just and reasonable within the spirit of s. 65(3) and (4) of the Act*, which states:

"(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate of service, or whether a service is offered or furnished under substantially similar circumstances and conditions.

"(4) In this section a rate is 'unjust' or 'unreasonable' if the rate is

> "(*a*) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,
>
> "(*b*) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or
>
> "(*c*) unjust and unreasonable for any other reason."

30 Under the heading "Cost of Service" the commission, over several pages, reviewed in detail various components of the cost of service which HVES estimated it would incur and for which it sought a rate sufficient to enable it to recover, and considered the objections to and criticisms of those cost components raised by the intervenors and various witnesses. It is not necessary here to review this aspect of the material in any great detail: it is sufficient to say that where the commission did not accept in full the submissions of HVES it reduced the eligible cost component by the amounts set out in the schedules to its order (see, in particular, sheet 5 of App. 1) with the result that HVES' revenue requirements, for rate-making purposes, were reduced accordingly. The commission also made a number of directions and recommendations to the company, of which the following are examples:

> *The commission directs the company to prepare and file with the commission an operating budget at the beginning of each fiscal year . . .*
>
> *The commission therefore directs that the company provide the commission with a time schedule for the completion of the work, as well as specific advice when the work is completed. In addition, the company is directed to file a copy of its preventive maintenance program by November 1, 1990,*

but these did not result in any further adjustments to the estimates of allowable and recoverable costs of service.

31 The commission then turned its attention to the question of "quality of service" and reviewed a number of complaints and dissatisfactions expressed by the intervenors. It concludes its discussion of this issue by saying:

> During the course of the hearing, the commission was impressed with the sincerity, variety and degree of expertise shown by the witnesses for the principal intervenor, the Hemlock Valley Ratepayers' Association. It is suggested to the company that consideration might well be given to drawing on this pool of talent. *The commission strongly recommends that a "utility consultation committee" be established by HVES, with members from the utility and representative ratepayers. Quarterly information meetings should serve to improve communications in the interest of the common goals of all the participants on the mountain.*

Apart from the recommendation which the commission made in this passage, nothing else was said by the commission with regard to quality of service and, most importantly, as will be noted later, no further adjustments were made to the rate base, rate of return or the allowable components of recoverable cost of service (other than those specifically referred to) by reason of any concern related to the quality of service provided by HVES to its customers.

32 The commission summarized its decision as follows:

> 7.0 DECISION SUMMARY
>
> 7.1 *Revenue Requirement*
>
> Section 44 of the *Utilities Commission Act* requires that:
>
> "44. Every public utility shall maintain its property and equipment in a condition to enable it to furnish, and it shall furnish, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable."
>
> It is the duty of the commission to see that this is done. It is also the duty of the commission to ensure that the utility has sufficient revenue to enable it to perform these functions. However, it must always be satisfied that the level of funding provided for is within the company's ability to use efficaciously.
>
> *On the basis of the evidence presented, the commission has set a revenue requirement to satisfactorily meet the above objectives (refer to attached schedules).*
>
> 7.2 *Rate Adjustment Phase-In*
>
> As mentioned in s. 1.0, the application contemplated a rate increase of 84.6 per cent in the test year. The adjustments to the cost of service in this decision have mitigated some of the potential rate shock. The commission considers that a return on rate base should be allowed; however, it believes that the ratepayers should be protected from the full impact initially. In arriving at this conclusion, the commission has recognized that there was a hiatus of some seven years between applications. In addition, the future economics and the viability of the mountain are at stake.
>
> *Accordingly, the commission orders that the rate base costs be phased in over three years. The commission requires the utility to file amended rate schedules incorporating an increase of 1.51¢ per kW.h over permanent rates effective July 1, 1990, and for further increases of 1.51¢ per kW.h and 0.75¢ per kW.h effective May 1, 1991 and May 1, 1992, respectively.*

2. *Reconsideration Decision*

33 In refusing the request of HVES for reconsideration and confirming its original decision, the commission said, under the heading "Jurisdiction":

2.0 JURISDICTION

The argument made on behalf of HVES has as its essence the jurisdiction of the commission, and it is set out in the letter dated December 14, 1990.

On p. 2 of that letter, s. 65(4) of the Act is quoted in its entirety, as is s. 66(1)(*a*) and (*b*). The submission then goes on:

"The words of Section 65(1)(b) [reference should be s. 65(4)(*b*)] and Section 66(1)(b) of the Act are a clear statutory direction to the Commission on how to determine a just and reasonable rate. In our respectful submission, in the presence of clear language, the Commission may not disregard those statutory provisions and substitute its own opinion of what is just or reasonable in any given case."

It is the commission's view that the submission is flawed in that it evidently invites the commission to ignore the clear language of s. 65(4)(*a*) and (*c*), and concentrate instead only on s. 65(4)(*b*) which supports the position of HVES. The commission holds that, in fixing a rate, it must have due regard to the whole of s. 64. Section 66(1)(*b*) makes this abundantly clear:

"the Commission shall have due regard, among other things, to the fixing of a rate that is not unjust or unreasonable, within the meaning of Section 65."

34 After referring to and distinguishing the decision of the Supreme Court of Canada in *British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission*, [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689, the commission continued:

The point which seems to be missed is that the commission's decision of October 17, 1990 must be taken as a whole and should be read and understood as such. It is not a decision on rate of return, followed by decisions at a later time on other matters. The phase-in is an integral part of the finding on just and reasonable rates. The decision as a whole should make it abundantly clear that the commission had concerns about "the nature and quality (of service) furnished by the utility." The impact on the customers of a large percentage increase suddenly imposed was another example of an "other reason" [s. 65(4)(*c*)] to which the commission gave due regard in deciding to phase in the increase in three steps. The commission was not prepared to grant an immediate increase in the amount requested by the applicant, but granted instead a modest increase initially and set a target for an allowable rate of return which HVES could work towards, together with suggestions and commentary on how the company might improve its operation.

35 The commission then turned to the question of "rate shock" and rejected the submission of HVES with respect to the three-year phase-in of the allowed rate increase. It stated its determination as follows:

The *Utilities Commission Act* places a duty upon the commission to balance all the factors which the Act includes as matters for due regard when fixing rates. HVES has emphasized one element, namely, return on the appraised value of the utility's property in terms of typical costs of money in the financial markets. It refers, in reply to argument by HVES to "the absolute

limitation imposed by s. 65(4)(b)." The commission does not accept that any such absolute limitation applies, but is of the view that counsel for HVES, at pp. 4 and 5 [There is an error in Karen Knott's quote.] has correctly recognized the breadth of the commission's mandate.

ISSUE

36 The issue before us, simply stated, is: "was the commission right?"

DISCUSSION

37 Any discussion of the scope of the commission's rate-making powers begins, of necessity, with the seminal decision of the Supreme Court of Canada in *British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission*, supra. In that case the Supreme Court had before it a legislative scheme prescribed by the *Public Utilities Act*, R.S.B.C. 1948, c. 277 (the "old Act") similar to (and here the appellant submits, identical to) the scheme found in the *Utilities Commission Act* (the "new Act"). It will, I think, be convenient to set out side by side the relevant provisions of the two statutes so that their similarities or differences may be readily apparent.

OLD ACT	NEW ACT
Interpretation.	**Discrimination in rates**
2.(1) In this Act . . .	65. (1) A public utility shall not make, demand or receive an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service furnished by it in the Province, or a rate that otherwise contravenes this Act, regulations, orders of the commission or other law.
"Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:	(2) A public utility shall not, as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description, and the commission may, by regulation, declare the circumstances and conditions that are substantially similar.
16. (1) In fixing any rate	
(*a*) The Commission shall consider all matters which it deems proper as affecting the rate.	
(*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and	

reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service.

(*c*) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate.

(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or whether a service is offered or furnished under substantially similar circumstances and conditions.

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

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

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

(*c*) unjust and unreasonable for any other reason.

Rates

66. (1) In fixing a rate under this Act or regulations

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

(*b*) the commission shall have due regard, among other things, to the fixing of a rate that is not unjust or unreasonable, within the meaning of section 65, and

(*c*) where the public utility furnishes more than one class of service, the commission shall segregate the various kinds of service into distinct classes of service; and in fixing a rate to be charged for the particular service rendered, each distinct class of service shall be considered as a self contained

> unit, and shall fix a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates fixed for any other unit.

38 The facts giving rise to the *British Columbia Electric* case are succinctly set forth in the majority judgment of Martland J. (for himself and Cartwright and Ritchie JJ.) at pp. 850-51 of the report [S.C.R.]:

> The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.
>
> The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act*.
>
> By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".
>
> By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.
>
> On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.
>
> The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act*, to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.
>
> Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.
>
> Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:

"The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.

"The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user."

At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

At p. 849 Martland J. had said:

Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:

"(1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the 'Public Utilities Act' should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?

"(*b*) If the answer to question (1) (*a*) is 'No', what decision should the Commission have reached on the point?"

Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

39 After summarizing the facts as I have set them out from the judgment of Martland J., his Lordship continued, at pp. 852-53:

In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:

"With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and

reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion."

The Court of Appeal concurred in this view. The judgment of the Court, delivered by Sheppard J.A., refers to this question in the following words:

"A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the 'fair and reasonable return'. . . Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, 'all matters which it deems proper as affecting the rate' and those falling within Sec. 16(1)(*b*), namely, 'the protection of the public' and 'a fair and reasonable return' to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance."

40 At p. 854 he observed, "The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words 'unjust' and 'unreasonable' in s. 2(1)" (quoted above).

41 At pp. 855-57, Martland J. said:

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

(i) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and

(ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

> As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss.8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.
>
> In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.
>
> The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*) and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).
>
> Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

He then answered the question posed as follows:

> Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

42 Locke J. delivered a separate concurring judgment in which, as appears at p. 849 of the report, he agreed specifically with the answer to the second part of the question proposed by Martland J.

43 Both Mr. Sanderson for the appellant and Mr. Foy for the respondent Attorney General of British Columbia relied heavily upon the decision in the *British Columbia Electric* case, each asserting that it supported their opposing points of view.

44 Mr. Foy firstly drew attention to the passage in the judgment of Martland J. at pp. 855-56 where that learned judge focused on the fact that, in s. 16 of the old Act, cl. (*b*) of subs. (1) does not use the word "consider," which is used in cl. (*a*), but directs that the commission "shall have due regard," among other things, to two specific matters. He then pointed to the fact that, by virtue of the wording and structure of ss. 66(1)(*b*) and 65(4), and particularly by s. 65(4)(*c*), of the new Act, a third matter, namely, that a rate may be "unjust and unreasonable for any other reason," has been elevated to being not merely one of the matters which the commission "considers proper and relevant affecting the rate" (its mandate under s. 66(1)(*a*)), but to one of the now three (formerly only two) specific matters to which the commission is directed to "have due regard." Mr. Foy then referred to the statement of Martland J. at p. 856 that "there must be a balancing of interests." From this he argued that the commission, in directing the three-year phase-in of the rate adjustment to ameliorate the rate shock, was simply "balancing" the interests of HVES on the one hand and its customers on the other, and contended that, in so doing, it was correctly applying the law which prescribes its mandate. It was entitled to what it did, he said, because the commission had concerns about "the nature and quality of service furnished by the utility."

45 Mr. Foy argued that to accede to the position of HVES would be to accord to one of the specific matters to which the commission must have due regard (the matter referred to in s. 65(4)(*b*)) a priority over the other two, something which cannot be done.

46 Mr. Sanderson submitted that once the commission had settled the content of the rate base and determined a rate of return which is both just and reasonable, it cannot fix a schedule of rates which yields less revenue than would be required to provide that rate of return on its rate base. In this respect he relied upon what Martland J. said at p. 856 (above). He also referred at length to the judgment of Locke J. and drew attention firstly to this passage at p. 841:

> The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

47 Locke J., in his reasons commencing at p. 841, reviewed the legislative history of the old Act and of its predecessor, the *Water Act Amendment Act*, S.B.C. 1929, c. 67, American regulatory jurisprudence, and the common law and said at p. 846:

> In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

48 Locke J. continued at p. 847:

> Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute,

And at pp. 847-48:

> I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required,

And finally, at p. 848:

> The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute, which does not mean that the obligation of the Commission to have due regard to the protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred

> to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

49 Mr. Sanderson accepted that the commission is required to have due regard to what is referred to in s. 65(4)(*c*) but submitted that, in directing the three-year phase-in of the rate adjustment with no offsetting provision to permit HVES to obtain sufficient revenue to recover the shortfall, the commission has committed the very sin which Mr. Foy charges against the utility, namely, that instead of having due regard – and giving effect – to the three specific matters set out in s. 65(4), it has accorded priority to either s. 65(4)(*a*) or (*c*) and relegated s. 65(4)(*b*) to simply "a matter to be considered."

50 Mr. Sanderson contended that if the commission was properly concerned to ameliorate the rate shock of a sharp rise in rates to be charged it could do so but only if, at the same time, it directed the filing of rate schedules which, over a reasonable period of time, would provide sufficient revenues to enable the utility to catch up and recover the shortfall. HVES, he said, is entitled to be made whole by the standards, in terms of the rate base and allowable rate of return thereon, which the commission itself fixed. It is only in this way that the commission can properly discharge its mandate and comply with the direction to have due regard to all the matters referred to in s. 65(4) without according priority to one or another of them.

51 The addition of s. 65(4)(*c*) in the Act, however, is not an *alternative* to s. 65(4)(*a*) and (*b*), but rather is an *additional* basis on which rates may be found to be unjust and unreasonable. Accordingly, while rates may be unjust or unreasonable for reasons other than those set out in s. 65(4)(*a*) and (*b*), it remains the law that if a rate is insufficient to yield a fair and reasonable return on rate base, it is necessarily "unjust and unreasonable" within the meaning of s. 65(4)(*b*).

52 Mr. Sanderson's submissions continued as follows:

53 A distinction has been drawn in the case law between regulatory systems which afford the administrative tribunal an unfettered discretion to fix rates and those which provide the tribunal with specific statutory directions as to how these rates are to be fixed: see *British Columbia Hydro & Power Authority v. Westcoast Transmission Co.*, [1981] 2 F.C. 646, 36 N.R. 33 (C.A.).

54 The current *Utilities Commission Act* is an example of the latter. Sections 65(4)(*b*) and 66(1)(*b*) amount to a statutory direction as to how the commission is to determine a just and reasonable rate. If, as posited by Martland J., a public utility is providing an adequate and efficient service, the statute is clear: a rate is unjust or unreasonable if it fails to yield a just and reasonable return on rate base. Here, while there may be room for improvement, the commission's recommendations with respect to quality of service referred to above are calculated to achieve what is desired. Accordingly, the commission has no discretion to fix rates which do not permit recovery of that return.

55 The virtually identical nature of the relevant provisions of the old Act and the new Act compel the conclusion that pursuant to the new Act, HVES is similarly given a statutory right to the approval of rates which will afford it the opportunity to earn a fair and reasonable rate of return upon the appraised value of its property. Commission O. G-77- 90 denies HVES that opportunity.

56 In my view Mr. Sanderson's submissions are sound and must be accepted.

57 The *Utilities Commission Act* empowers the commission to deter mine what is a fair and reasonable rate of return upon the appraised valu of the property of regulated utilities, but, having done so, requires th commission to set rates so as to allow recovery of a rate which permits a opportunity to earn that return. In this case, the commission correctl exercised its discretion to determine what a just and reasonable retur was, but wrongly failed to permit HVES to charge a rate which gave it a opportunity to earn that return. For this reason, it is my view that com mission O. G-77-90 cannot stand, and that O. G-11-91 must fall with it.

58 With respect to Mr. Foy's able and forceful submissions they are, i my view, flawed, and for these reasons.

59 Firstly, in directing the three-year phase-in, the commission was not balancing interests or, if it was purporting to do, it acted improperly. The proper balancing of interests which the commission carried out was done and completed when it settled the rate base, fixed the rate of return and determined the costs of operation allowable for rate-making purposes. It must be remembered that the rate base itself was the subject of much contention at the public hearing and that only after the commission had considered alternative calculations for rate base did it decide to accept HVES' evidence in this regard. It must be remembered as well that HVES had proposed a rate of return of 13 per cent on the debt component

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and 15 per cent on the equity component of the rate base. The commission denied HVES' request and fixed 13 per cent as the just and reasonable rate of return on both components. In addition, as can be seen from sheet 5 of the Appendix to these reasons, the commission made substantial downward adjustments to many of HVES' estimates of its costs of operation.

60 This is the balancing of interests which the commission carried out in performing its function. HVES has accepted the commission's decision in these respects. None are the subject of this appeal. Once this balancing of interests had been performed, it was the commission's duty to have due regard to the factors referred to in s. 65(4).

61 Secondly, I cannot accept Mr. Foy's contention that the three-year phase-in was the result of the commission's expressed concern over the quality of service. The analysis I have made of the original decision and of the reconsideration decision in my view refutes this contention. Alternatively, if in fact the commission decreed the three-year phase-in for this suggested reason it was wrong in law in doing so for it gave an unwarranted priority to one or another of the matters set out in s. 65(4) at the sacrifice of s. 65(4)(*b*).

62 Thirdly, Mr. Foy submitted that "rate shock" is a recognized phenomenon which has attracted a number of rate moderation plans, including rate base phase-ins, in the utility regulation field, and he referred to the following authorities: Bonbright, Danielsen and Kamerschen, *Principles of Public Utility Rates* (1988), pp. 260-64; D. Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable" (1983), 112 Public Utilities Fortnightly, September 1, pp. 28-34; I.M. Massella, "Rate Moderation Plans – Cushioning 'Rate Shock' " (1984), 113 Public Utilities Fortnightly, February 16, pp. 52-56; *Re California-Pacific Utilities Co.*, 52 P.U.R. 3d 446 (1964); and *Re Pacific Telephone & Telegraph Co.*, 65 P.U.R. 3d 517 (1966).

63 The underlying principle of this theory of gradualism in the implementation of new rate schedules is perhaps best explained in the article by Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable." There the author wrote at p. 28:

> In 1982 two new terms were added to the electric utility industry's lexicon: "rate shock" and "phase-in." Rate shock refers to a sudden and "substantial" increase in electric rates. The concept can be illusive because the demarcation between "substantial" and "nonsubstantial" rate increases is usually a function of local political and economic sensitivities rather than a definitive, universal percentage increase. However, a 50 per cent jolt in rates would

> generally be considered substantial – well beyond the tolerance levels of most state commissions and ratepayers. Increases in the 20 per cent to 30 per cent vicinity, though, are more ambiguous. Rate shock is really a manifestation of the dollar disparity between rate base and new generating plant investment – the construction work in progress (CWIP) account. For a number of utilities the CWIP to net plant ratio can exceed 100 per cent, necessitating a high revenue increase – a rate shock – to reflect the plan in rate base upon commercial operation. As an alternative to the conventional one-shot hike in rates, new rate-making techniques have been proposed which are designed to spread the revenue impact of new plan investment into the postoperative years – hence, the term "phase-in".
>
> Post-operational phase-in can be accomplished in a variety of ways, most of which rely on accounting adjustments to protect the integrity of reported earnings. *The basic thesis in each case is the same: Capital recovery is spread over the asset's useful life with no economic loss (at least in theory) to the utility.* (emphasis added)

64 It can be seen that the purpose of "phase-in" is two-fold: to ameliorate the shock of suddenly imposed significant rate increases and, at the same time, to protect the integrity of the utility's earnings. As the title to Mr. Scotto's article itself indicates, it is merely "prolonging the inevitable."

65 The two regulatory decisions, *Re California-Pacific Utilities Co.*, decided in 1964, and *Re Pacific Telephone & Telegraph Co.*, decided in 1966, appear to be out of step with the main stream of American regulatory jurisprudence for, like the decision of the commission under consideration here, they did not provide for any catch up so that the utility could, over time, realize its authorized rate of return. I cannot regard them as binding or even persuasive.

66 The power of the commission to phase in rates was perhaps presaged by Martland J. in the penultimate paragraph in his judgment in the *British Columbia Electric* case, where he said at p. 857:

> . . . the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, *until a rate schedule is devised which meets the requirements of clause (b) of s. 16(1).* (emphasis added)

67 What the commission did here fails to meet the requirements of the legislation.

DISPOSITION

68 In Pt. 4 of its factum, under the heading "Nature of Order Sought," the appellant seeks an order that:

(a) the decision of the British Columbia Utilities Commission, dated January 30, 1991 be quashed;

(b) that portion of the decision of the British Columbia Utilities Commission, dated October 17, 1990 requiring rates to be phased in and directing a refund be quashed;

(c) the British Columbia Utilities Commission be directed to order HVES to file new tariff schedules permitting it to recover 13% on rate base from July 1, 1990;

(d) monies held by Lawson, Lundell, Lawson & McIntosh pursuant to the order of Mr. Justice Toy of March 7, 1990 be paid to HVES;

(e) costs; and

(f) such further relief as to this Honourable Court may seem just.

69 I think the proper course for this court to adopt is to allow this appeal and to refer the matter back to the commission with the direction that it permit, or require, HVES to file new tariff schedules which will enable it to earn 13 per cent on its determined rate base from July 1, 1990.

70 If the commission considers it necessary or appropriate to ameliorate rate shock by directing the phasing in of such revised rates, it shall do so in a way which meets the requirements of s. 65(4) as set out in these reasons.

71 It will be for the commission to make an order for the appropriate disposition of the funds referred to in para. (d) above.

72 Section 118 of the Act exempts the commission from any liability for the costs of this appeal. I do not think it appropriate to order that the Attorney General, and thereby the general public, bear those costs. However, I note from para. 5.3 of the original decision and from sheet 3 of the Appendix that provision was made for the recovery, through the rates to be charged, of the sum of $35,000 for HVES' rate application costs before the commission.

73 Accordingly, I would direct that, failing agreement between the parties, HVES tax its costs for fees and disbursements of and incidental to this appeal and that the amount so determined be included in the rate application costs in the schedule.

Order accordingly.

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY RATE BASE SCHEDULE 1		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
ASSETS					
Structures and improvements		$5,560			$5,560
Overhead conductors and devices		44,891			44,891
UG Conductors and devices		479,504			479,504
Line transformers		90,693			90,693
PLANT IN SERVICE, opening		$620,648	$0		$620,648
Additions to plant in service		0			0
Disposals		0			0
PLANT IN SERVICE, closing		620,648	0		620,648
Add: Work in progress		0			0
		620,648	0		620,648
Less: Accumulated Depreciation		(178,677)			(178,677)
NET PLANT IN SERVICE		441,971	0		441,971
WORKING CAPITAL ALLOWANCE		0			0
RATE HEARING COSTS		0			0
CONTRIBUTIONS IN AID		(75,460)			(75,460)
UTILITY RATE BASE		$366,511	$0		$366,511
RETURN ON RATE BASE		14.01%	-1.01%		13.00%

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY INCOME & RETURN SCHEDULE 2		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
SALES VOLUME MWh		2,047			2,047
		==========	==========		==========
RATES					
Existing Revenue:¢/kWh		8.65	0.00		8.65
Interim Increase %		42.77%	0.00%		42.77%
Final Increase %		84.62%			43.54%
First year phase-in: ¢/KWh			1.51		1.51
Second year phase-in: ¢/kWh			1.51		1.51
Third year phase-in: ¢/kWh			0.75		0.75
Final Rate: ¢/kWh		15.97	-3.55		12.42
Interim Rate		12.35			
REVENUE					
Existing Rates		$177,066	$0		$177,066
Interim Rates		75,739			75,739
Required Increase		74,101	(72,740)		1,361
Discounts		0			0
Other Income		0			0
		----------	----------		----------
TOTAL REVENUE		326,906	(72,740)		254,166
Less: PURCHASED POWER		125,500	(15,371)	[1]	110,129
		----------	----------		----------
GROSS MARGIN		201,406	(57,369)		144,037
% excluding Other Income		61.61%	-4.94%		56.67%
Administration, Accounting and Office		68,300	(25,300)	[2]	43,000
Repairs, Maintenance and Vehicle		31,000	(11,000)	[3]	20,000

UTILITY INCOME & RETURN SCHEDULE 2		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
Snow Removal		18,000	(18,000)	[4]	0
Depreciation		15,065			15,065
Amortization of Rate Application		10,000	1,667	[6]	11,667
OPERATING EXPENSES		142,365	(52,633)		89,732
Utility income before tax		59,041	(4,735)		54,306
INCOME TAX EXPENSE		7,693	(1,035)		6,658
EARNED RETURN		$51,348	($3,700)		$47,648
RETURN ON RATE BASE		14.01%	-1.01%		13.00%

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

INCOME TAXES SCHEDULE 3		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
UTILITY INCOME BEFORE TAX		$59,041	($4,735)		$54,306
Deduct – Interest		(23,823)	0		(23,823)
ACCOUNTING INCOME		35,218	(4,735)		30,482
Timing differences					
Depreciation		15,065	0		15,065
Amort. of hearing costs		10,000	1,667	[6]	11,667
Amortization of Line Costs		0			0
Capital cost allowance		(15,065)			(15,065)
Amort. of contributions					0
Overhead capitalized					0
Plant removal costs					0
Rate application costs		(30,000)	(5,000)	[6]	(35,000)
		(20,000)	(3,333)		(23,333)
TAXABLE INCOME		$15,218	($8,069)		$7,149
Income tax rate – deferred		21.84%	0.00%		21.84%
Income tax rate – current		21.84%	0.00%		21.84%
Income tax expense					
– Deferred		$4,369	$728		$5,097
– Current		3,324	(1,762)		1,561
INCOME TAX EXPENSE		$7,693	($1,034)		$6,658

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

RETURN ON CAPITAL SCHEDULE 4		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
Contribution in Aid		$0	$0		$0
proportion		.00%	0.00%		.00%
Capital Loan		$0	$0		$0
proportion		.00%	0.00%		.00%
embedded cost		.00%	0.00%		.00%
$ return		$0	$0		$0
Current Debt		$0	$0		$0
proportion		.00%	0.00%		.00%
embedded cost		.00%	0.00%		.00%
$ return		$0	$0		$0
Notional debt		$183,256	$0		$183,256
proportion		50.00%	$0		50.00%
embedded cost		13.00%	0.00%		13.00%
$ return		$23,823	$0		$23,823
Preferred shares		$0	$0		$0
proportion		.00%	0.00%		.00%
embedded costs		.00%	0.00%		.00%
$ return		$0	$0		$0
Common equity		$183,256	$0		$183,256
proportion		50.00%	0.00%		50.00%
ROE		15.02%	-2.02%	[5]	13.00%
$ return		$27,525	($3,700)		$23,824
TOTAL CAPITAL		$366,511	$0		$366,511

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

ADJUSTMENTS	
1. $15,371	Adjust BC Hydro charges for error in Application
2. $25,300	Adjust Administration, Accounting and Office expenses to approved amount.
3. $11,00	Adjust Repair and Maintenance expenses to approved amount.
4. $18,000	Eliminate Snow Removal expenses.
5. 2.02%	Adjust return on equity to 13%
6. $5,000	Adjust Rate Hearing costs.

Rate Increase Phase-in consists of:	Application	Final	First Year
Purchased Hydro	6.13	5.38	5.38
Operating expenses	6.22	3.65	3.65
Rate Base costs	3.62	3.39	1.13
Total	15.97	12.42	10.16
		% Increase	17.42

TAB 6

Citation: Jacobsen et al v. Bergman et al
2002 BCCA 102

Date: 20020208
Docket: CA026069
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Low

February 8, 2002

Vancouver, B.C.

BETWEEN:

**SHEL N. JACOBSEN and
473359 BRITISH COLUMBIA LTD.**

PLAINTIFFS
(APPELLANTS)
(RESPONDENTS BY CROSS-APPEAL)

AND:

**DONALD BERGMAN, TERRY D. FAY, RICHARD PERDUE,
JOHN D. SHELLING, SECTOR FINANCIAL SERVICES LTD.,
and SECTOR SECURITIES INC.**

DEFENDANTS
(RESPONDENTS)
(APPELLANTS BY CROSS-APPEAL)

T.G. Keast — appearing for the Appellants

J.S. Forstrom — appearing for the Respondents

[1] **LAMBERT, J.A.:** The principal point in this appeal is about the interpretation and application of an option clause in a shareholders agreement.

[2] This proceeding is fact specific. It is about the interpretation of a unique agreement, prepared in unique circumstances, to cover a unique relationship. In my opinion it raises no disputed general principles of law. It involves the application of well-understood principles to the particular facts.

[3] The applicable principles may be stated in this way. It is not sufficient in interpreting a clause in an agreement to look only at the wording of the clause in order to decide on its meaning and application; instead the clause must be examined in its place in the agreement as a whole. Further, the agreement as a whole, and the clause in particular, must be examined in the context of the

factual matrix which gave rise to the agreement and against which the agreement and the clause were intended to operate.

[4] Just as in statutory interpretation, so also in contract interpretation. The fact that the section or clause seems to have a plain enough meaning when viewed in isolation does not preclude, but indeed requires, an examination of the whole text of the statute or agreement, and a consideration of the section or clause in their place in the whole text and in the factual matrix in which they were intended to operate. That process is required in every case of interpretation of either a statute or an agreement.

[5] Of course the process I have described does not detract in any measure from the importance of the words chosen to express the mutual intention of the parties. It merely underlines the view that it is the mutual intention of the party that is being sought and not simply the lexical possibilities inherent in the words chosen to express that mutual intention, perhaps by a third party advisor.

[6] It must always be borne in mind that the function of an interpreting court is to give effect to the mutual intention of the parties and not to create an agreement or an obligation that the parties did not intend, merely because they might well have intended it.

[7] As I have said, this agreement and clause are fact specific. The trial judge, Mr. Justice Burnyeat, reserved judgment after a seven day trial devoted in large measure to evidence about the factual matrix of the agreement. He wrote a careful and detailed judgment giving a close analysis of the clause and its place in the agreement as a whole and in the factual matrix of the developing relationship between the parties. Those reasons are available on Quick Law at [1999] B.C.J. No. 1356. I do not propose to summarize them.

[8] Clause 10.1 (e) of the ***Shareholders Agreement*** reads:

> DEFAULT
>
> [1] It is an event of default (a "Default") if a Shareholder (the "Defaulting Shareholder") (the other Shareholders being the "Non-Defaulting Shareholders"):
>
> ...
>
> [5] fails to observe, perform or carry out any of his obligations under any employment contract made between the Company and such Shareholder.

[9] "Company" and "Shareholder" are defined but it is significant that the definition section says that the definition will apply "unless the context is inconsistent therewith" thereby mandating an examination of the context before applying the definitions.

[10] Mr. Justice Burnyeat made that examination. He applied the principles of interpretation that I have described. He made no error in principle. This is what he said:

> [42] Accordingly, I am satisfied that it was the intention of the original signatories to the Shareholders' Agreement and it was the intention of the plaintiffs when they executed the Amendment Agreement acknowledging that they were bound by the terms and provisions of the Shareholders' Agreement that paragraph 10.1(e) of the Shareholders' Agreement would be interpreted by all parties as including references to employment by both Financial and Securities even though only employment by Financial is set out in that

> paragraph. To interpret this paragraph otherwise requires the unacceptable interpretation that the default provision dealing with employment was not intended by any of the parties to have any meaning and was not intended to be an event of default. In fact, a strict interpretation of the provisions of paragraph 10.1 might well require that any defaults relating to the affairs of Securities would not be a default under the Shareholders' Agreement. That was clearly not what was intended by the parties to the Shareholders' Agreement, the provisions of which the plaintiffs agreed to be bound.

[11] With respect, in my opinion, Mr. Justice Burnyeat reached the right result for the right reasons. I would not accede to this ground of appeal.

[12] The second ground appeal is that it was said to be an error to grant the remedy of specific performance, a discretionary remedy, in circumstances where it was said that the conduct of the defendants disentitled them to the benefits of an equitable remedy.

[13] It is not clear that this point was argued at trial, but in any event the moral and legal rectitude of the parties are not to be determined against absolute standards but against the conduct of each other and the conduct of rational people in their business.

[14] Having regard to the nature of the breach of Clause 10.1(e) by the plaintiff, I think that it was well within the discretion of the trial judge to grant the remedy of specific performance. If it may be thought that he did not address this issue squarely I would do so and decide that the defendants were not disentitled to the remedy of specific performance.

[15] The third ground of appeal is said to be that it was in error to treat the plaintiff as disentitled to profits of the company in the period from when he started to work within the company structure and the date of 1 September 1995 when he completed his purchase of fully paid up shares in the company and when he adopted the shareholders' agreement.

[16] In my opinion, having regard to the plaintiff being compensated as a principal with one hundred percent of commissions and overrides from when he started work within the corporate structure until 1 September 1995, and having regard to the fact that the formal arrangements were not completed until 1 September 1995, there was no error, palpable or otherwise, in the trial judge concluding that the plaintiff was not entitled to a share of the profits prior to 1 September 1995.

[17] I would not accede to any of the three grounds argued by the plaintiff, appellant. It follows that I would dismiss the appeal.

[18] FINCH, C.J.B.C.: I agree.

[19] LOW, J.A.: I agree.

[20] FINCH, C.J.B.C.: The appeal is dismissed.

"The Honourable Mr. Justice Lambert"

Correction: March 14, 2002

Pg. 4, par. 7 - Quik Law should be Quick Law

TAB 7

1986 CarswellNat 756
Federal Court of Canada-Appeal Division

Canadian National Railway v. Nakina (Township)

1986 CarswellNat 756, [1986] F.C.J. No. 426, 69 N.R. 124

In The Matter of an Appeal by the Corporation of the Township of Nakina from the Decision of the Canadian Transport Commission dated 16th August, 1985, pursuant to Section 64, National Transportation Act

The Corporation of the Township of Nakina, Appellant,
v. Canadian National Railway Company, Respondent

Pratte, Urie and Hugessen JJ.

Judgment: June 26, 1986
Docket: Doc. A-80-86

Counsel: *John H. Hornak, Esq.* , for the Appellant.
Terrence H. Hall, Esq. , for the Respondent.
(*Ms.*) *Diane Nicholas* , for the Canadian Transport Commission.

Subject: Public

Headnote

Railways --- Federal regulatory boards — Orders and decisions — Jurisdiction to issue order or make decision — Abandonment of line

Railway Act, R.S.C. 1970, c. R-2, s. 120.

Canadian National Railway requiring leave of Canadian Transport Commission to abandon appellant's station for "run-through" -- Commission ruling that although regard must be had to public interest, Commission not entitled to take into consideration effects of abandonment on appellant community -- Commission granting leave and appellant appealing -- Appeal allowed -- In considering whether to grant leave to abandon station pursuant to s. 120 of Act, Commission entitled to take into consideration effects of "run-through" on appellant community.

***Hugessen J.*:**

1986 CarswellNat 756, [1986] F.C.J. No. 426, 69 N.R. 124

REASONS FOR JUDGMENT

1 The Canadian National Railway Company (CN) proposes changes in its freight train operations between Hornepayne and Armstrong, in Northern Ontario. The changes involve a "run-through" and consequent closing or abandonment of the station at Nakina. Accordingly leave of the Canadian Transport Commission was required pursuant to section 120 of the Railway Act. [1]

2 The Railway Transport Committee of the Commission held hearings in connection with the proposed closure or abandonment. At those hearings, the appellant, the Corporation of the Township of Nakina, appeared and presented evidence and argument tending to show that the proposed changes would have a drastic effect upon the economy of the region.

3 The Committee's decision, which forms the subject matter of the present appeal, granted the requested leave to CN. On the matter of the Township's intervention, the Committee stated the problem before it in the following terms:

> Section 120 of the *Railway Act* merely provides that a railway company shall not remove, close or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees *without leave of the Commission* . (emphasis added). In the Committee's opinion, it is an accepted principle that where no limits or guidelines are placed on the discretion of the Committee, the Committee may consider the public interest in deciding whether or not to grant leave. While this is clear, it was not apparent how broadly the Committee should define the public interest in the context of section 120. That is, should the Committee examine only those aspects of the public interest that impact directly on railway operations or are all aspects of the public interest relevant? (Case Book, p. 16-17).

4 After extensively reviewing the case law on the question, none of which it found to be directly on the point, the Committee concluded as follows:

> On balance, then, the Committee is of the opinion that it is not entitled, by the words of section 120 of the *Railway Act* , to take into consideration the effects of a run-through on the Township of Nakina. (Case Book, p. 23).

5 I find this conclusion startling. The Committee concedes that it must have regard to the public interest. I would have thought that, by definition, the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the

public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is accordingly, in my view, an error of law justifying the intervention of this Court.

6 But there is more. In its rationale for limiting its view of what was the public interest, the Committee, quite correctly in my view, stated:

> ...the question of how broadly it should define the public interest must be answered not only with reference to section 120, but by taking into consideration the *Railway Act* as a whole. (Case Book, p. 22-23).

7 It then went on to give the following analysis of the general scheme of the Act:

> The *Railway Act* is legislation dealing with the running of railways and, by its terms, it gives the Railway Transport Committee of the Canadian Transport Commission jurisdiction in the areas of the technical operation of the railways, the safe operation of the railways and the service provided by the railways in their operation. In a general sense, the Committee is under a duty to exercise this jurisdiction for the public benefit. However, this cannot mean that in all operational, safety and service matters that the Committee must look beyond the immediate issue and adjudicate between the particular railway's interest and the interests of the public in general. This being the case, a narrow interpretation of the factors to be considered in granting leave would be in keeping with the well recognized aim of preserving harmony within the *Act* . (Case Book, p. 23).

8 I confess that I am at a loss to understand this passage. While it is true, of course, that the *Railway Act* gives the Commission special responsibilities in the three areas identified by the Committee, namely, technical operation, safety and service, its power of decision making is by no means limited to a narrow consideration of those matters only. Indeed in some cases the Commission is directed to decide in only the most general terms such as in accordance with the public convenience and necessity. To put the matter another way, while the Commission may have the jurisdiction, in the public interest, to regulate questions of technical operation, safety and service, those fields of jurisdiction do not themselves constitute either a limitation or a definition of what the public interest is, either generally or with regard to any particular case.

9 If evidence is relevant to the determination of the question of public interest, it must be admitted and considered. For my part, I find it impossible to say that evidence dealing with the probable economic effects of the proposed changes on the surrounding communities would not be relevant to the question of the public interest. By the same token, I could not say that, for example, evidence as to the probable environmental effects of the proposed changes would not be relevant. Relevance is, of course, always a matter of degree and will

vary from case to case depending on the surrounding circumstances; that, however, goes to weight rather than admissibility.

10 Accordingly, it is my opinion that it would have been error for the Committee not to admit the appellant's evidence; having admitted it, it was error for the Committee to hold that it could not consider it. For clarity, however, I would emphasise that the error lies simply in the failure to consider. Clearly the weight to be given to such consideration is a matter for the discretion of the Commission, which may, in the exercise of that discretion, quite properly decide that other considerations are of greater importance. What it could not do was preclude any examination of evidence and submissions as to the adverse economic impact of the proposed changes on the affected community.

11 I would allow the appeal and certify to the Commission the opinion that, in considering whether or not to grant leave to close or abandon the station at Nakina pursuant to section 120 of the *Railway Act* , the Commission is entitled to take into consideration the effects of a run-through on the Township of Nakina.

Louis Pratte. J.:

12 I agree.

John J. Urie. J.:

13 I agree.

Footnotes

1 R.S.C. 1970, c. R-2.

120. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of section 119 are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees, without leave of the Commission; and where any such change is made the company shall compensate its employees as the Commission deems proper for any financial loss caused to them by change of residence necessitated thereby.

TAB 8

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] 1 SCR 69, 2010 SCC 4 (CanLII)

Date: 2010-02-12
Docket: 32460
Other citations: 315 DLR (4th) 385; [2010] 3 WWR 387; 100 BCLR (4th) 201; 65 BLR (4th) 1; 281 BCAC 245; 397 NR 331; [2010] CarswellBC 296; EYB 2010-169491; JE 2010-321; [2010] SCJ No 4 (QL); 86 CLR (3d) 163
Citation: Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] 1 SCR 69, 2010 SCC 4 (CanLII), <http://canlii.ca/t/27zz2>, retrieved on 2017-03-14

SUPREME COURT OF CANADA

CITATION: Tercon Contractors Ltd. *v.* British Columbia (Transportation and Highways), 2010 SCC 4, [2010] 1 S.C.R. 69

DATE: 20100212
DOCKET: 32460

BETWEEN:

Tercon Contractors Ltd.
Appellant
and
Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways
Respondent
– and –
Attorney General of Ontario
Intervener

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Cromwell J. (LeBel, Deschamps, Fish and Charron JJ. concurring)
(paras. 1 to 80)

DISSENTING REASONS: (paras. 81 to 142)

Binnie J. (McLachlin C.J. and Abella and Rothstein JJ. concurring)

Tercon Contractors Ltd. *v.* British Columbia (Transportation and Highways), 2010 SCC 4, [2010] 1 S.C.R. 69

Tercon Contractors Ltd.
Appellant

v.

Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways
Respondent

and

Attorney General of Ontario
Intervener

Indexed as: Tercon Contractors Ltd. *v.* British Columbia (Transportation and Highways)

2010 SCC 4

File No.: 32460.

2009: March 23; 2010: February 12.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts — Breach of terms — Tender — Ineligible bidder — Exclusion of liability clause — Doctrine of fundamental breach — Province issuing tender call for construction of highway — Request for proposals restricting qualified bidders to six proponents — Province accepting bid from ineligible bidder — Exclusion clause protecting Province from liability arising from participation in tendering process — Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder — If so, whether Province's conduct fell within terms of exclusion clause — If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.

The Province of British Columbia issued a request for expressions of interest ("RFEI") for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents that it now intended to design the highway itself and issued a request for proposals ("RFP") for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim." As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company ("EAC"), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a "major member" of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour. She held that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province's breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

Held (McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting): The appeal should be allowed. The Court agreed on the appropriate framework of analysis but divided on the applicability of the exclusion clause to the facts.

The Court: With respect to the appropriate framework of analysis the doctrine of fundamental breach should be "laid to rest". The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the

freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. Despite agreement on the appropriate framework of analysis, the court divided on the applicability of the exclusion clause to the facts of this case as set out below.

Per LeBel, Deschamps, Fish, Charron and Cromwell JJ.: The Province breached the express provisions of the tendering contract with Tercon by accepting a bid from a party who should not even have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages. By considering a bid from an ineligible bidder, the Province not only acted in a way that breached the express and implied terms of the contract, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process.

Submitting a compliant bid in response to a tender call may give rise to "Contract A" between the bidder and the owner. Whether a Contract A arises and what its terms are depends on the express and implied terms and conditions of the tender call and the legal consequences of the parties' actual dealings in each case. Here, there is no basis to interfere with the trial judge's findings that there was an intent to create contractual obligations upon submission of a compliant bid and that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. The tender documents and the required ministerial approval of the process stated expressly that the Province was contractually bound to accept bids only from eligible bidders. Contract A therefore could not arise by the submission of a bid from any other party. The trial judge found that the joint venture of Brentwood and EAC was not eligible to bid as they had not simply changed the composition of their team but, in effect, had created a new bidder. The Province fully understood this and would not consider a bid from or award the work to that joint venture. The trial judge did not err in finding that in fact, if not in form, Brentwood's bid was on behalf of a joint venture between itself and EAC. The joint venture provided Brentwood with a competitive advantage in the bidding process and was a material consideration in favour of the Brentwood bid during the Province's evaluation process. Moreover, the Province took active steps to obfuscate the reality of the true nature of the Brentwood bid. The bid by the joint venture constituted "material non-compliance" with the tendering contract and breached both the express eligibility provisions of the tender documents, and the implied duty to act fairly towards all bidders.

When the exclusion clause is interpreted in harmony with the rest of the RFP and in light of the commercial context of the tendering process, it did not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate in the tendering process. The closed list of bidders was the foundation

of this RFP and the parties should, at the very least, be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred only upon one potential bidder. The requirement that only compliant bids be considered and the implied obligation to treat bidders fairly are factors that contribute to the integrity and business efficacy of the tendering process. The parties did not intend, through the words found in this exclusion clause, to waive compensation for conduct, like that of the Province in this case, that strikes at the heart of the tendering process. Clear language would be necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement where transparency is essential. Furthermore, the restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. When the statutory provisions which governed the tendering process in this case are considered, it seems unlikely that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. The text of the exclusion clause in the RFP addresses claims that result from "participating in this RFP". Central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders — the process followed by the Province — is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

Per McLachlin C.J. and Binnie, Abella and Rothstein JJ. (dissenting): The Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion compensation clause. The clause is clear and unambiguous and no legal ground or rule of law permits a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation in this case. A court has no discretion to refuse to enforce a valid and applicable contractual term unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. The public interest in the transparency and integrity of the government tendering process, while important, did not render unenforceable the terms of the contract Tercon agreed to.

Brentwood was a legitimate competitor in the RFP process and all bidders knew that the road contract would not be performed by the proponent alone and required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor or identified with Brentwood as a joint venture "proponent" with EAC. Tercon has legitimate reason to complain about the Ministry's conduct, but its misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Contract A is based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. At issue is the intention of the actual parties not what the court may project in hindsight would have been the intention of reasonable parties. Only in rare circumstances will a court relieve a party from the bargain it has made.

The exclusion clause did not run afoul of the statutory requirements. While the *Ministry of Transportation and Highways Act* favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement and cannot plausibly be interpreted to have that effect. Tercon — a sophisticated and experienced contractor — chose to bid on the project, including the risk posed by an exclusion of compensation clause, on the terms proposed by the Ministry. That was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.

The interpretation of the majority on this point is disagreed with. "[P] articipating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause.

Moreover, the exclusion clause was not unconscionable. While the Ministry and Tercon do not exercise the same level of power and authority, Tercon is a major contractor and is well able to look after itself in a commercial context so there is no relevant imbalance of bargaining power. Further, the clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A were available. The parties expected, even if they did not like it, that the "no claims" clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

Finally, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Cases Cited

By Cromwell J.

Applied: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, 2000 SCC 60 (CanLII), [2000] 2 S.C.R. 860; **considered:** *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426; *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129 (CanLII), 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North*

America v. Gordon Capital Corp., 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423; *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 1997 CanLII 4452 (ON CA), 34 O.R. (3d) 1; **referred to:** *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 (CanLII), [2007] 1 S.C.R. 116; *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, 1986 CanLII 44 (SCC), [1986] 1 S.C.R. 57.

By Binnie J. (dissenting)

Hunter Engineering Co. v. Syncrude Canada Ltd., 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426; *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, 1981 CanLII 17 (SCC), [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 (CanLII), [2001] 2 S.C.R. 943; *Martel Building Ltd. v. Canada*, 2000 SCC 60 (CanLII), [2000] 2 S.C.R. 860; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 (CanLII), [2007] 1 S.C.R. 116; *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197, aff'd [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423; *ABB Inc. v. Domtar Inc.*, 2007 SCC 50 (CanLII), [2007] 3 S.C.R. 461; *Re Millar Estate*, 1937 CanLII 10 (SCC), [1938] S.C.R. 1; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309 (CanLII), 245 D.L.R. (4th) 650.

Statutes and Regulations Cited

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APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Mackenzie and Lowry JJ.A.), 2007 BCCA 592 (CanLII), 73 B.C.L.R. (4th) 201, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647, [2008] 2 W.W.R. 410, 249 B.C.A.C. 103, 414 W.A.C. 103, 66 C.L.R. (3d) 1, [2007] B.C.J. No. 2558 (QL), 2007 CarswellBC 2880, setting aside a decision of Dillon J., 2006 BCSC 499 (CanLII), 53 B.C.L.R. (4th) 138, [2006] 6 W.W.R. 275, 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227,

[2006] B.C.J. No. 657 (QL), 2006 CarswellBC 730. Appeal allowed, McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting.

Chris R. Armstrong, *Brian G. McLean*, *William S. McLean* and *Marie-France Major*, for the appellant.

J. Edward Gouge, Q.C., *Jonathan Eades* and *Kate Hamm*, for the respondent.

Malliha Wilson and *Lucy McSweeney*, for the intervener.

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

CROMWELL J. —

I. Introduction

[1] The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

[2] The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

[3] The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted "egregiously" (2006 BCSC 499 (CanLII), 53 B.C.L.R. (4th) 138, at para. 150). The judge then turned to the Province's defence based on an exclusion clause that barred claims for compensation "as a result of participating" in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon's claim for damages. In effect, she held that it was not within the contemplation of the parties

2. Legal Principles

[64]The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

[65]In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting from "participating in this RFP", properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

3. Application to This Case

[66]Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

[67]To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e.g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116, "it is imperative that all bidders be treated on an equal footing . . . . Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder."

[68]This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129 (CanLII), 250 Nfld. & P.E.I.R. 145, at para. 35:

> The owner — in this case the government — is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

[69]One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.

[70]The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

[71]The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, "[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process." It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

[72]The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on

TAB 9

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. B.C. Utilities Commission,*** 2006 BCCA 537

Date: 20061130

Docket: CA034328; CA034336; CA034341; CA034342

Docket: CA034328

Between:

Tsawwassen Residents Against Higher Voltage Overhead Lines Society

Appellant

And

The British Columbia Utilities Commission and the British Columbia Transmission Corporation

Respondents

- and -

Docket: CA034336

Between:

Island Residents Against Higher Voltage Overhead Lines Society

Appellant

And

The British Columbia Utilities Commission and the British Columbia Transmission Corporation

Respondents

- and -

Docket: CA034341

Between:

Sea Breeze Victoria Converter Corporation

Appellant

And

British Columbia Transmission Corporation
British Columbia Utilities Commission and
British Columbia Hydro and Power Authority

Respondents

- and -

Docket: CA034342

Between:

Neil Atchison, P.Eng.

Appellant

And

The British Columbia Utilities Commission and the
British Columbia Transmission Corporation

Respondents

Before: The Honourable Madam Justice Levine (In Chambers)	
J.J. Arvay Q.C. and M.G. Underhill	Counsel for the Appellant (CA034328)
D. Austin	Counsel for the Appellant (CA034336)
P.J. Landry, J.K. Herbert and J.R. Devins	Counsel for the Appellant (CA034341)
N. Atchison	In-Person (CA034342)
D.G. Cowper, Q.C. A.W. Carpenter and C. Bystrom	Counsel for the Respondent B.C. Transmission Corporation

C.W. Sanderson, Q.C. and M. Storoni	Counsel for the Respondent B.C. Hydro and Power Authority
Place and Date of Hearing:	Vancouver, British Columbia October 25, 2006
Place and Date of Judgment:	Vancouver, British Columbia November 30, 2006

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The applicants sought leave to appeal from the decision of the British Columbia Utilities Commission made July 7, 2006 (the "Decision"), granting British Columbia Transmission Corporation ("BCTC") a Certificate of Public Convenience and Necessity ("CPCN") for the construction of the Vancouver Island Transmission Reinforcement Project ("VITR").

[2] The Decision may be found on the Commission's website at: *<<http://www.bcuc.com/Documents/Decisions/2006/1-VITR%20Decision-July%207%202006%20-%20Web.pdf>>.*

[3] On November 7, 2006, I released brief reasons for judgment granting leave to appeal on one ground and dismissing the applications for leave on all of the other grounds, with reasons to follow. These are those reasons.

[4] The applicants, Sea Breeze Victoria Converter Corporation ("Sea Breeze"), Tsawwassen Residents Against Higher Voltage Overhead Lines ("TRAHVOL"), Island Residents Against Higher Voltage Transmission Lines ("IRAHVOL"), and Neil Atchison, were intervenors in the proceedings before the Commission, including pre-hearing consultations and the seven-week oral public hearing held in February and March 2006.

[5] The respondent, BCTC, applied to the Commission for a CPCN to construct transmission facilities to Vancouver Island. British Columbia Hydro and Power Authority ("B.C. Hydro") intervened before the Commission on this application.

[6] The applications for leave were brought under s. 101(1) of the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473, which provides that: "An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court". While not expressly stated in s. 101, it is accepted that an appeal from the Commission is restricted to questions of law: see ***Joint Industry Electricity Steering Committee v. British Columbia (Utilities Commission)***, 2005 BCCA 330 ("***JIESC***") at paras. 5 and 75.

[7] The applicants raised 21 grounds of appeal in their submissions on the applications for leave. Some of the grounds overlap, and I condensed them to 15 for the purposes of review. The condensed 15 grounds of appeal, and the applicant or applicants who raised each ground, are set out in Appendix A.

[8] With one exception, all of the grounds of appeal raise either issues of fact or mixed fact and law. The question on which I granted leave, raised by TRAHVOL and IRAHVOL, is a question of law. It is whether existing right of way agreements permit the construction of new overhead transmission lines under Option 1.

[22] Factors (c) and (f) apply to all of the grounds of appeal. The Commission Panel was unanimous in its decision, suggesting that an appeal is unwarranted. On the other hand, no other appellate body has considered the Decision, suggesting that leave should be granted. As B.C. Hydro suggests in its submissions, the other four factors are more relevant in considering whether leave should be granted on the grounds of appeal raised by the applicants in this case.

Analysis

[23] The applicants do not dispute that in the Decision, the Commission considered and discussed at length the evidence, arguments and issues raised by the applicants and intervenors. The applicants' grounds of appeal must be considered in the context of the whole of the Decision.

Chapter 1: The Certificate of Public Convenience and Necessity and the Regulatory Process

[24] The Commission began the Decision in chapter one with a discussion of the need for reinforced transmission supply to Vancouver Island, the relevant determinations from past Commission decisions, and the alternative solutions proposed. None of the grounds of appeal challenge this discussion.

Chapter 2: Jurisdiction and Other Legal Issues

[25] In the second chapter of the Decision, the Commission discussed issues relating to its jurisdiction to issue a CPCN. This included references to cases relied on by the applicants on these leave applications, including ***Memorial Gardens Assn. (Can.) Ltd. v. Colwood Cemetery Co.***, [1958] S.C.R. 353 and ***Sumas Energy 2 Inc. v. Canada (National Energy Board)***, 2005 FCA 377, for the test of what constitutes public convenience and necessity. The Commission quoted (at 11) from ***Memorial Gardens*** (at 357):

> ...it would...be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity....the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.
>
> As this Court held in the Union Gas case, supra, the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission, but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

[26] The Commission noted (at 15) that it had previously concluded that "...the test of what constitutes public convenience and necessity is a flexible test", a conclusion with which none of the applicants disagreed.

[27] The Commission also considered (at 11) ***Nakina (Township) v. Canadian National Railway Co.*** (1986), 69 N.R. 124 (F.C.A.) (cited with approval in ***Sumas Energy 2***), which dealt with the jurisdiction of the Railway Transport Committee. The Court in ***Nakina*** found that the Committee had erred in law in failing to consider, where it was required to have regard to the public interest, evidence of the effect of the closing of a railway station on the economy of the local community. The Court said (at para. 5):

> ...I would have thought that, by definition, the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is according, in my view, an error of law justifying the intervention of this court.

The Commission quoted (at 11) the following passage from ***Nakina*** (at para. 10):

> For clarity, however, I would emphasise that the error lies simply in the failure to consider. Clearly the weight to be given to such consideration is a matter for the discretion of the Commission, which may, in the exercise of that discretion, quite properly decide that other considerations are of greater importance. What it could not do was preclude any examination of evidence and submissions as to the adverse economic impact of the proposed changes on the affected community.

[28] After a discussion of further submissions on the content of the public interest, the Commission's determination on this part of the Decision (at 16) was:

> **Given the need for a project to provide adequate and reliable power to Vancouver Island customers, the Commission Panel concludes that it is in the public interest that the most cost-effective alternative be selected from amongst the competing alternatives. Further delay in finding a solution for Vancouver Island customers is not an option that is in the public interest. Moreover, all the alternative solutions for Vancouver Island customers have adverse impacts. The alternatives, including VITR with its several route options, VIC, and JdF, need to be compared to determine the best, most cost-effective means of supplying power to Vancouver Island. Each alternative has different impacts on interests; some of those interests may be considered public interests and others are private interests. The Commission Panel is of the opinion that both public and private interests should be considered in selecting the project alternative and route option that is in the public interest, although the relative weight placed on the different interests may vary.**
>
> [Bold in original.]

[29] The Commission's discussion and conclusion of the content of the public interest and the test of public convenience and necessity are relevant to the claims by Sea Breeze, TRAHVOL, and IRAHVOL that the Commission erred in holding that public convenience and necessity is to be determined by the most cost-effective option rather than what is in the public interest (Appendix A, 1). The Commission was clearly alive to its obligation to consider all relevant factors, and to determine the appropriate balance in the context of identifying a viable alternative to meet the needs of Vancouver Island residents. An analysis of the Decision as a whole demonstrates that it did so. Had the Commission limited its consideration of the factors put before it by the participants in the proceedings to matters of cost only, that would have been an error of law, as demonstrated by ***Nakina***, and a question of general importance as to the jurisdiction of the Commission. However, the discussion of the relevant factors in determining public convenience and necessity in chapter two and the consideration of socioeconomic and other non-financial factors in subsequent chapters, described below, demonstrates that there are no substantial questions to be argued that the Commission failed to consider any relevant factor. For these reasons, leave to appeal on this ground was not granted.