

**NOVA SCOTIA UTILITY AND REVIEW BOARD**



**IN THE MATTER OF THE PETROLEUM PRODUCTS PRICING ACT**

- and -

**IN THE MATTER OF AN APPLICATION by TUSKET ULTRA MART LTD.** pursuant to s. 24(1) of the Petroleum Products Pricing Regulations requesting an increase of 0.6 cents per litre on both minimum and maximum mark-ups for self-service and full-service gasoline and diesel retail margins

- and -

**IN THE MATTER OF AN APPLICATION by IRVING OIL MARKETING G.P.** pursuant to s. 24(1) of the Petroleum Products Pricing Regulations requesting an increase of 0.1 cents per litre in the transportation allowance

**BEFORE:** Roland A. Deveau, Q.C., Vice Chair  
Murray E. Doehler, CPA, CA, P.Eng., Member  
Roberta J. Clarke, Q.C., Member

**APPLICANTS:** **TUSKET ULTRA MART LTD.**  
Joseph Jean-Guy (Guy) Surette

**IRVING OIL MARKETING G.P.**  
Sara Mahaney, LL.B.

**INTERVENORS:** **CONSUMER ADVOCATE**  
David J. Roberts, LL.B.

**ATLANTIC CONVENIENCE STORES ASSOCIATION**  
David Knight, Senior Consultant

**CST CANADA CO.**  
Warren Maynard, V.P. Wholesale

**SERVICE NOVA SCOTIA**  
Ryan T. Brothers, LL.B.

**BOARD COUNSEL:** Richard J. Melanson, LL.B.

**BOARD CONSULTANT:** Michael Gardner, M.A., LL.B.  
Gardner Pinfold Consultants Inc.

Greg Strange, CPA, CA  
David McKenna, CPA, CA  
Levy Casey Carter MacLean, Chartered Accountants

**HEARING DATE:** May 2, 2016

**FINAL SUBMISSIONS:** June 17, 2016

**DECISION DATE:** September 26, 2016

**DECISION:** The Board approves an increase in the retail margin of 0.3 cents per litre in the minimum self-service and full-service mark-up and an increase of 0.4 cents per litre in the maximum self-service mark-up.

The Board also approves an increase to the transportation allowance of 0.1 cents per litre in each zone.

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## 1.0 INTRODUCTION

[1] On October 13, 2015, an application was received by the Nova Scotia Utility and Review Board (“Board”) from Guy Surette, owner of Tusket Ultra Mart Ltd. (“Applicant” or “Tusket”), which operates a retail gasoline outlet at Civic #4137, Highway 308, Tusket, Yarmouth County, Nova Scotia, requesting that the Board increase the minimum and maximum self-service and full-service retail mark-ups by 0.6 cents per litre (“cpl”) (the “Retail Margin Application”). The Board notes here that the word “margin” will be used interchangeably with “mark-up” in this Decision.

[2] In his letter, Mr. Surette also requested that the Atlantic Convenience Stores Association (“ACSA”) be permitted to assist him in conducting the Retail Margin Application.

[3] On December 14, 2015, Irving Oil Marketing G.P. (“Irving”), a formal intervenor on the Retail Margin Application, also applied to the Board requesting an increase of 0.1 cpl in the transportation allowance, also referred to as transportation adjustments in the *Petroleum Products Pricing Regulations* (“Regulations”) (the “Transportation Allowance Application”).

[4] The Board determined that both the Retail Margin Application and the Transportation Allowance Application should be heard in a consolidated hearing.

## 2.0 BACKGROUND

[5] In 2005, the Province of Nova Scotia (“Province”) enacted the *Petroleum Products Pricing Act*, S.N.S. 2005, c.11 (“Act”), permitting regulation, with certain exceptions, of the price of gasoline and diesel oil (“regulated petroleum products”). For simplicity, this type of regulation will be referred to in this Decision as “gasoline pricing

regulation” as the context requires. While the statute was enacted in 2005, gasoline pricing regulation did not actually take effect in the Province until July 1, 2006. Gasoline pricing regulation was administered by Service Nova Scotia and Municipal Relations, and its Minister, until September 30, 2009.

[6] Effective October 1, 2009, the *Regulations* were amended to transfer gasoline pricing regulation to the Board.

[7] When the Province reintroduced gasoline pricing regulation on July 1, 2006, it established regulated retail margins for self-service (minimum of 4.0 cpl and maximum of 5.5 cpl) and full-service (minimum of 4.0 cpl and maximum of 7.5 cpl) and transportation allowances by zones. These margins and allowances were reviewed by the Board in its Decision on October 16, 2006 [2006 NSUARB 108]. In 2007, based on a review by Gardner Pinfold, its consultant at the time, the Province did not impose a maximum mark-up for full-service, a practice continued by the Board.

[8] In a Decision dated November 23, 2011 [2011 NSUARB 181], the Board approved an increase in the retail margin. The minimum self-service and full-service mark-ups were increased by 0.8 cpl and the maximum self-service mark-up was increased by 1.1 cpl. An application for increases to the transportation allowances was also approved as follows:

<b>Zone</b>	<b>Former Allowance</b>	<b>Approved Increase</b>	<b>Approved Allowance (rounded)</b>
1	0.3	0.15	0.5
2	0.7	0.29	1.0
3	1.2	0.20	1.4
4	1.2	0.31	1.5
5	1.2	0.29	1.5
6	2.0	0.17	2.2

[9] Both increases were approved, effective January 6, 2012.

### 3.0 REGULATIONS

[10] The purpose of regulating gasoline prices is outlined in the *Regulations*:

2 The purpose of these regulations is to ensure just and reasonable prices for specified petroleum products, taking into consideration all of the following objectives:

- (a) preserving availability of specified petroleum products in rural areas;
- (b) stabilizing prices of specified petroleum products;
- (c) minimizing the variances in prices of specified petroleum products across the Province.

[11] Among other powers and duties assigned to the Board, the *Regulations* provide:

**17(1)** For each type of petroleum product, the fixed wholesale price in a zone is the sum of all of the following:

- (a) the current benchmark price as prescribed by the Board under Section 16;
- (b) the wholesale margin as calculated by the Board in accordance with subsection (4);
- (c) all taxes, excluding the taxes imposed under subsections 165(1) and 165(2) of the Excise Tax Act (Canada);
- (d) if the Board considers it appropriate, transportation adjustments and forward averaging corrections.

...

#### **Maximum and minimum retail mark-up**

**18 (1)** When prescribing the minimum and maximum retail mark-ups for a type of petroleum product in a zone, the Board may consider any factors the Board considers relevant, including any of the following:

- (a) the retail mark-ups within the Province or a zone for the type of petroleum product, excluding taxes imposed under subsections 165(1) and 165(2) of the Excise Tax Act (Canada), over a period of time the Board considers appropriate;
- (b) whether the retail mark-ups identified under clause (a) are just and reasonable, taking into account any of the following:
  - (i) the distance from a refinery gate to the boundaries of the zone,
  - (ii) the volume of petroleum product sold to consumers during the period,
  - (iii) innovations within the industry;
- (c) whether the petroleum product is sold or purchased at a full-service retail outlet or a self-service retail outlet;

- (d) whether the minimum retail mark-up will preserve the viability of markets affected by their proximity to the provincial border.

**(2)** The minimum and maximum retail mark-ups must be expressed in Canadian cents per litre to the nearest one-tenth of a cent or another unit of measurement appropriate to the petroleum product.

...

**Public hearings by Board**

**22(1)** The Board is hereby designated under ~~subsection~~ [clause] 14(1)(g) of the Act to conduct public hearings respecting any matter within its jurisdiction under these regulations, including any of the following:

- (a) dividing the Province into zones;
- (b) fixing wholesale prices, maximum retail prices and minimum and maximum retail mark-ups set under these regulations; ...

...

**Investigations by Board to ensure matters just and reasonable**

**24(1)** With or without notice, the Board may on its own motion investigate whether any matter within its jurisdiction under these regulations is just and reasonable, including any of the following matters:

- (a) the boundaries of the zones;
- (b) the fixed wholesale prices;
- (c) the maximum retail prices;
- (d) the minimum and maximum retail mark-ups.

**(2)** On application by any of the following, the Board must carry out an investigation under subsection (1):

- (a) a retailer, wholesaler or wholesaler-retailer;
- (b) any 5 persons, firms or corporations;
- (c) the Minister.

**(3)** Following an investigation, the Board may make any order it considers necessary to ensure any matter within its jurisdiction under these regulations is just and reasonable, but no order may be made by the Board until a public hearing or inquiry is held in respect of the matter.

#### **4.0 PROCEEDINGS AND FORMAL INTERVENORS**

[12] By Hearing Order issued on October 21, 2015, the Board directed that a hearing be conducted respecting the Retail Margin Application, establishing a timeline for the filing of requests for formal standing, the filing of evidence and information requests

("IRs"), the filing of letters of comment by the public and requests to speak at the evening session, and the scheduling of the hearing.

[13] The Notice of Public Hearing for the Retail Margin Application was published in the Chronicle Herald and the Cape Breton Post on October 24 and 28, 2015.

[14] On December 14, 2015, Irving filed the Transportation Allowance Application. The Board issued a further Hearing Order to establish a timeline for this matter so that the Applications could be heard concurrently. The Notice of Public Hearing was published in the Chronicle Herald and the Cape Breton Post on December 19, 2015 and January 2, 2016.

[15] The Consumer Advocate ("CA") and Service Nova Scotia ("SNS") were granted formal standing in both Applications. Irving, the ACSA, and CST Canada Co. sought, and were granted, standing as Formal Intervenors in the Retail Margin Application.

[16] The hearing was held at the Board's offices at Halifax, Nova Scotia, on May 2, 2016.

[17] Guy Surette, the Applicant in the Retail Margin Application, appeared on his own behalf and testified at the hearing. As noted earlier in this Decision, he was assisted during the hearing by the ACSA, through its Senior Consultant, David Knight. David J. Roberts, LL.B., acting as the CA, participated in the hearing. SNS was represented by Ryan T. Brothers, LL.B., while CST Canada Co. was represented by Warren Maynard, its V.P. Wholesale.

[18] Irving was represented at the hearing by Sara Mahaney, LL.B. She called a witness panel to testify in support of its Application, comprised of Omer Fournier,



Director, Pricing and Supply, and Greg Yager, CPA, CGA, Project Manager, Network Development.

[19] Michael Gardner, M.A., LL.B., a principal of Gardner Pinfold Consultants Inc., appeared as an expert witness on behalf of Board Counsel with respect to the Retail Margin Application. He was qualified by the Board to provide opinion evidence as an economist, providing testimony on gasoline pricing and related matters.

[20] Board Counsel also retained Levy Casey Carter MacLean, Chartered Accountants ("Levy Casey"), to conduct an independent evaluation of the Transportation Allowance Application. Greg Strange, CPA, CA, and David McKenna, CPA, CA, were both qualified as experts by the Board to provide opinion evidence on accounting and audits.

## **5.0 ISSUES**

[21] The following issues will be addressed in this Decision:

1. Should there be an increase in the minimum and/or the maximum retail mark-ups for both self-service and full-service gasoline and diesel? If so, by what amount?
2. Should the transportation allowance be increased in any or all of the zones? If so, by what amount?

## **6.0 ANALYSIS AND FINDINGS**

### **6.1 Should there be an increase in the minimum and/or the maximum retail mark-ups? If so, by what amount?**

#### **(a) Evidence**

[22] Mr. Surette testified about the operations of the applicant, Tusket Ultra Mart Ltd. It is a business that is owned and operated by him and his wife, located in Tusket,

Yarmouth County. He has operated the gas station for 41 years and the convenience store for 21 years.

[23] As explained by Mr. Surette, the retail gasoline outlet includes several other components in its business. While the building has four service bays, only two bays are used to conduct mechanical work. They sell only self-service at their gas pumps. The other lines of business include a convenience store, a small ice cream operation, and the sale of propane. The nature of his business has remained the same since 2010, except for the addition of the seasonal ice cream shop. He stated that he tries to make a profit in every line of business.

[24] In terms of his application for an increase in the retail margin, Mr. Surette testified that his costs have increased since the last margin increase approved by the Board, which was effective January 6, 2012. Specifically, he noted the rising cost of electricity, the minimum wage, and credit card transaction fees.

[25] In addition to increased costs, Mr. Surette noted that they were struggling with decreasing sales volumes for gasoline products. He said that when the price of petroleum products increased a few years ago his volume of gas sales decreased 10% as customers drove less. He also indicated that, given the proximity of his business to the Town of Yarmouth (and its six or seven gas outlets), he is forced to maintain his prices at the minimum price to keep his customers and his sales volumes.

[26] In support of his application for a retail margin increase, Mr. Surette also described the process he used to allocate costs to his retail gasoline business. He noted how he had benefitted from the help provided by a consultant to a group of stations and the ACSA about breaking out the costs for the different lines of business. He said he

made a *bona fide* attempt to apportion the costs between the different business operations to properly reflect the costs of each operation, including labour, utilities, heat, maintenance, depreciation and other costs. In his view, the costs allocated to the retail gas business are reflective of that operation, versus the non-petroleum side of the operation.

[27] Mr. Surette indicated he is an independent retailer who has actually opted out of the regulated margin for petroleum products, as permitted under the *Regulations*.

[28] Mr. Knight of the ACSA testified in support of the application by Tusket. He noted that even though Mr. Surette had opted out of the regulated margin, it was Mr. Knight's view that any increase in the retail margin would benefit the retail industry:

MR. KNIGHT: Mr. Surette has a supply agreement with his wholesaler, and we are not privy to what that agreement is, and any change in the retail mark-up could be incorporated into that supply agreement but we do not have details of that supply agreement.

...

...We are aware that supply agreements within the province, by the time you factor in length of contract, ownership of inventory, basic pricing, infrastructure, subsidies, financing -- so there are a multitude of potential supply agreements across the province. I think, when we look at it, that it's an economic reality that any change in the net or the total amount would be used to benefit the industry.

It doesn't make much economic sense for a wholesaler to deliberately threaten the financial viability of their supply chain. So, our position is, yes, it's not cut and dried but at the end of the day any change benefits the industry, both supply and the retail side.

THE CHAIR: So, at some point if there's an increase it would make its way into -- from your -- in your opinion, would make its way into the pricing charged at the pump in terms of -- on behalf of the retailer?

MR. KNIGHT: That is the information we have from our retailers, yes. It tends to support the industry, the retailer, yes.

[Transcript, pp. 30-31]

[29] This was confirmed at the hearing by Mr. Surette, at least as it relates to his business:

MR. SURETTE: ...I know that when the price went up the penny in 2011/'12 that -- I think, if that was the question, did it benefit -- yes, our -- my -- the [speaks in French] -- the profit I made went up, yeah.

THE CHAIR: Yeah. So, it -- your -- it was something that got basically absorbed into your agreement at that time, it made it to your supply agreement?

...

THE CHAIR: Okay. How long did that take, do you know? Was it instantaneous or was it like...

MR. SURETTE: ...No, it was pretty instantaneous.

[Transcript, pp. 32-33]

[30] Mr. Gardner, who was retained by Board Counsel, testified about his review of the application for an increase in the retail margin. He prepared a report which was filed in this proceeding. While his actual numerical recommendations are covered in depth below, Mr. Gardner reached a few important conclusions about the industry following his review.

[31] In his report, Mr. Gardner included volume impacts to the margin revenue. In his original report, he used volume information obtained from Statistics Canada ("StatsCan").

[32] In response to ACSA IR-1, Mr. Gardner included revised volumetric data. The underlying volume data for this table came from SNS, the entity responsible for collecting motive fuel tax, which is based on a per litre amount. Mr. Gardner viewed this volume data to be much more reliable than StatsCan's.

[33] In the end, Mr. Gardner concluded that there had been an increase in average volume per station since the onset of regulation. He said that a contributing factor was a net decline of 41 stations between 2006 and 2015. He acknowledged on questioning that the phenomenon of increasing average volume may indeed not have occurred in the rural parts of the Province, in cases such as that of Mr. Surette.

[34] When considering the more reliable volume data, Mr. Gardner noted that average station margin revenue actually increased by slightly more than average station

cost increases, which if considered, would eliminate the need for an increase to the retail margin. In response to the ACSA IR-1, he noted that average margin revenue increased by 26.7% from 2006 to 2014, while average operating costs increased by 25.3% over the same time frame.

[35] During questioning by the CA, Mr. Gardner did not make the recommendation that average volume be used to determine whether a margin increase is required or not, but rather said that the Board should decide what factors it considers relevant. He said that considering volume may be helpful.

[36] Mr. Gardner acknowledged that the *Regulations* do not specify how the Board is to take volume into consideration in prescribing the retail mark-up, but the *Regulations* explicitly state the Board may consider it.

[37] His recommendations for adjustments to the retail margin are contained in Table 11 of his Report, and he concluded with the following two recommendations:

44. Rising costs have eroded the retail margin prescribed in 2012. The margin impact for the outlet categories and resulting adjusted minimum and maximum mark-ups are set out in Table 11. Following the discussion in para. 26, I recommend that the Board adjust the mark-up depending on the cost base it deems most appropriate: A. Outlets With no Change in Format, or, B. All Outlets Reporting (including those that had implemented format changes).

45. I recommend that the Board take a long-term perspective on making any volumetric adjustments to mark-ups derived on the basis of periodic analyses like this one. Assuming this recommendation is accepted, for this current review, the long-term change in average volume is minimal and does not warrant an adjustment to the mark-ups in Table 11.

[Exhibit T-3, p. 17]

[38] Later in the proceeding, despite revised data received from SNS that showed average volume per station had actually increased, Mr. Gardner was not prepared to conclude that volume should be determinative in the face of Mr. Surette's evidence of declining volume, at least in some parts of rural Nova Scotia.

[39] Mr. Gardner testified that margin revenue is important in looking at the industry. He noted that it is important to look at both costs and revenue. Further, he queried whether consumers should pay for decisions of corporate outlets to try to gain more market share by changing the format of their operations (e.g., by changing the hours of operation or commencing different lines of business, like adding a convenience store).

[40] Based on its review, Gardner Pinfold's final recommendations respecting the retail margin increase are as follows:

**Table 11 (revised): Recommended mark-up adjustment**

	Recommended mark-up adjustment			
	Margin impact		Adjusted mark-up	
	<u>Minimum</u>	<u>Maximum</u>	<u>Minimum</u>	<u>Maximum</u>
A. Outlets with no change in format	0.28	0.38	5.1	7.0
B. All outlets reporting	0.52	0.72	5.3	7.3

[Exhibit T-4, p. 6]

### **(b) Submissions**

#### **Applicant and the Atlantic Convenience Stores Association**

[41] Mr. Surette did not file any written submissions. The ACSA filed closing submissions on June 10, 2016, and reply submissions on June 17, 2016. As noted earlier, the ACSA was assisting Mr. Surette in this proceeding. Therefore, the Board considers the ACSA's submissions are intended to represent his position, as well as its own. The ACSA stated that it supports an increase in the minimum and maximum retail margins for self-serve gasoline, although in its closing submission it supported a slightly smaller increase in the minimum, and a slightly higher increase in the maximum, than Mr. Surette had sought.

[42] Tusket's application was for a 0.6 cpl increase for each of the minimum and maximum retail margins. The ACSA proposed increases of 0.55 cpl and 0.75 cpl,

respectively. It said that these amounts were "...derived from a survey of corporate gasoline retailers conducted by..." Gardner Pinfold.

[43] While the ACSA said that the Board should not increase the margins based on increased operating costs experienced by one outlet, it submitted that Mr. Surette's evidence of increases in his operating costs, coupled with a decline in the volume sold, was uncontradicted. The decline in volume Mr. Surette is experiencing was mitigated by his "...operating with minimum coverage in major costs areas, such as staffing, for some time."

[44] The ACSA responded to the CA's statement that the data supporting Mr. Surette's application was not his, but that of the ACSA, and thus the Applicant had not met the burden of establishing the need for the requested increase. It said:

The Atlantic Convenience Stores Association assisted the Applicant in estimating what a reasonable adjustment to the retail margin might be. The association utilized the same weighted change in expense categories methodology as the Board Consultant, with the one exception that the Applicant estimated operating expenses related to retail gasoline services, whereas the Board Consultant based their analysis on changes in operating costs associated with all products and services offered by a business.

All financial data used by the Atlantic Convenience Stores Association to assist the Applicant in estimating an adjustment to the retail margin were provided solely by the Applicant and were based solely on: a) operating costs for Tusket Ultra Mart Ltd.; and b) the Applicant's estimates of expenses related to retail gasoline services.

[ACSA Reply Submission, p. 2]

[45] As discussed below, the CA also questioned the difference between the information in the Application and that provided by Mr. Surette in the Gardner Pinfold survey which Mr. Gardner said he could not reconcile. This led the CA to question the source of the data. In response, the ACSA stated:

...Mr. Gardner clearly suggests that he compared changes in **annual total business costs** to the Applicant's indexed change of estimated operating costs for **retail gasoline services**. If this is true, then Mr. Gardner was working with two distinctly different and non-comparable sets of information. [Emphasis in original]

[ACSA Reply Submission, p. 4]

[46] The ACSA stated in its reply submission that Mr. Surette was never asked "...to make available the actual dollar values used in his calculations". Additionally, Mr. Gardner did not contact him to discuss the allocation between total business costs and retail gasoline service costs.

[47] The ACSA further challenged the Gardner Pinfold survey results for a number of reasons. First, it does not agree that the limited responses from independent outlets (11 of 213) serve as a reliable statistical basis. It submits that the survey sample is not representative of the population of independent gasoline retailers in Nova Scotia. It said that the independent retailer sample should be excluded from any calculation of the impact of the margin.

[48] The ACSA submitted, however, that the 95 responses of 188 corporate retail outlets is reasonably representative of that population. Therefore, although this group has lower operating costs, the increases in costs experienced should be accepted as a reflection of the industry as a whole.

[49] The ACSA took exception to Gardner Pinfold's use of average "throughput" in considering the impact on margins of changes in volume of product sold. It noted that Mr. Gardner had testified that the use of average value is a "metric of convenience". The ACSA said its validity has not been tested.

[50] Additionally, the ACSA did not accept the manner in which Gardner Pinfold treated changes in operating format in reaching its conclusions. Mr. Gardner had considered that such changes, for example, an increase in hours of operation, result in increased operating costs, and proposed to exclude them from his analysis. The ACSA challenged this as an unprecedented, subjective and unvalidated hypothesis which



should not be accepted "...without more detailed study". The ACSA said excluding retailers who had experienced changes in operating format would create a 0.24 cpl difference between those corporate retail outlets who had experienced a change and those who had not. This would have "...significant implications for regulated gasoline margins", in its view.

[51] It claimed that an increase of 0.55 cpl for the minimum retail margin and 0.75 cpl for the maximum would be fair and reasonable, and would support the objectives of the *Regulations*.

### **Consumer Advocate**

[52] The CA submitted that the Board should not allow the Application for three main reasons:

- a) The reliability of the information submitted to the Board in support of the application is uncertain and the Board has no way of determining whether it is representative of the experience of the retail industry as a whole.
- b) The industry appears to be doing quite well with the existing margins. Data on the average volume of gasoline sold by stations shows that margin revenue is increasing at a greater rate than operating costs.
- c) Cost data before the Board shows that since the margins were last reviewed some operators undertook significant, discretionary expenditures to increase their share of the existing retail market. Consumers should not be asked to offset this discretionary spending by paying higher retail margins.

[CA Closing Submission, p. 3]

[53] In the view of the CA, the increase which Tuskett sought was not reflective of the increased operating costs which it had experienced, but was an amount determined with the help of the ACSA. He submitted that Tuskett was being used as a proxy for the ACSA. However, he noted that the ACSA had not introduced any evidence in the proceeding.

[54] Further, the CA said that the data which Mr. Surette had supplied in his response to the Gardner Pinfold survey demonstrated lower actual increases than those stated in the Application.

[55] The CA went on to submit:

18. An increase in the maximum margin would have no impact on the Applicant's business and the owner, Mr. Surette, was unable to explain why he had applied for it when he was questioned by the Board: Testimony of Guy Surette, Hearing transcript, pages 14-15.

19. The Applicant is an independent retailer and has opted out of the regulated margin. As such, the actual margin he receives when he sells gasoline and diesel fuel is determined by his supply agreement with his wholesaler. Tusket Ultra Mart may or may not receive the full benefit of any margin increase ordered by the Board: Testimony of Guy Surette, Hearing transcript, pages 29-30, pages 33-34.

[CA Closing Submission, p. 5]

[56] The CA also submitted that the Board could not conclude whether Tusket is representative of the industry as a whole, particularly because it is experiencing a decline of nearly 10% in sales volume.

[57] In his reply submission, the CA noted that the ACSA was no longer supporting the increase requested by Tusket, but was relying on its interpretation of Gardner Pinfold survey results to justify 0.55 cpl and 0.75 cpl increases. In the view of the CA, there is no evidence to support those amounts as they were not tested in the hearing.

[58] The CA said that Mr. Gardner's evidence was that no adjustment to the retail margin is required "...based on the amount of revenue that is being generated by the margins". He pointed to the evidence of sales volume which is a factor to be considered by the Board under the *Regulations*, stating that Mr. Gardner had concluded that revenue from retail margins has grown at a faster rate than operating costs.

[59] A further factor impacting the increase in operating costs, according to the CA, is where gasoline retailers have had a change in their operating format, a point which was addressed by Mr. Gardner. The CA submitted that the Board should not consider the data from such outlets as a basis for any increase in margin for the reasons expressed by Mr. Gardner, which he summarized as follows:

45. Mr. Gardner based his opinion on three factors:
  - a) These costs were willingly incurred by operators to increase their market share. They were not imposed on operators by forces beyond their control.
  - b) Increased market share for one operator would likely be achieved at the cost of reduced market share for another operator.
  - c) The higher operating costs resulting from a change of format should be offset from revenue from the expanded service. Otherwise, why do it?

[CA Closing Submission, p. 10]

[60] The CA submitted that increased operating costs resulting from changes in format are "discretionary expenditures" for which consumers should not be expected to pay.

[61] In response to the ACSA closing submission, the CA submitted that Mr. Gardner's conclusions regarding retail outlets with changes in format were not unproven, radical or hypothetical as the ACSA had suggested in its closing submission. Instead, the CA said they were supported by the evidence.

[62] The CA concluded that there is insufficient evidence on which the Board can rely to support any increase in retail margins. He stated, however, that if the Board were prepared to order increases in the retail margins, with the exclusion of costs associated with format changes, the increase for the minimum should only be 0.28 cpl, and 0.38 cpl for the maximum.

**(c) Findings**

[63] The Board observes that the evidence of Mr. Surette to support his request for a 0.6 cpl increase in both the minimum and maximum self-service and full-service retail margins is largely anecdotal. The ACSA, on which he relied for support, did not present any evidence at the hearing. As well, the CA presented no evidence. The submissions of both the ACSA and the CA were based on their respective interpretations of the evidence of Gardner Pinfold.

[64] As noted earlier in this Decision, the Board has not previously imposed a maximum mark-up for full-service, and it sees no reason to depart from that.

[65] The Board further observes that, since there is a wide variety of business models in the retail sale of petroleum products, it would be unwise to rely on the evidence of the experience of only one operator. The Board notes, however, that this is not, in any way, a criticism of Mr. Surette or his evidence. His data is simply not representative of the industry as a whole.

[66] In contrast, the evidence of Gardner Pinfold was based on data collected in its survey of retailers. In the Board's view, greater weight must be given to such evidence. While the CA had argued that there was insufficient evidence before the Board to make a finding, he submitted that the amounts calculated by Gardner Pinfold could be accepted by the Board if it were inclined to allow an increase.

[67] The Board finds that it should exclude stations which had changes in format from consideration, for the reasons Mr. Gardner noted, and as urged by the CA. The Board is not persuaded, on the evidence, that changes in format which result in increased operating costs should form the basis of an increase to which petroleum products consumers should be required to contribute or pay. Consequently, the Board does not

accept ACSA's request for a 0.55 cpl increase for the minimum, and 0.75 cpl for the maximum, mark-ups, which it based on "all outlets reporting".

[68] The Board accepts that Mr. Gardner's Table 11, revised in response to the CA's IR-4 (Exhibit T-4, p. 6), represents his calculations of mark-up adjustments. The corrections to Table 11 from his original and revised reports (Exhibits T-2 and T-3) were not the result of any changes in assumptions. The changes to the Table were the result of more accurate data and the correction of a calculation error.

[69] Having found that it should exclude stations which had changes in format, the Board had before it differing views of what the increases should be: Mr. Surette's 0.6 cpl for both minimum and maximum; the CA's submission for no increase in the retail margins; and Gardner Pinfold's 0.28 cpl for the minimum and 0.38 cpl for the maximum.

[70] The Board observes that although it may take volume into account when determining margins, there is a lack of reliable data, in this proceeding, to determine how volume changes may relate to the objects of the *Regulations*. In this regard, the Board is mindful of Mr. Surette's testimony that the volume of petroleum products sold has decreased in rural Nova Scotia. The preservation of the availability of petroleum products in rural areas is also a factor the Board must consider under the *Regulations*. Although, in some places, the increased average volume may have offset increased costs, the Board places greater weight on the need to meet the objective of the availability of petroleum products in rural areas.

[71] The Board finds that the best evidence before it is that of Gardner Pinfold. The Board notes, however, that the increases Gardner Pinfold recommended are less than those sought by Mr. Surette.

[72] Section 18(2) of the *Regulations* prescribe that the retail margins "...must be expressed in Canadian cents per litre to the nearest one-tenth of a cent..." Accordingly, and taking into consideration the objectives set out in s. 2 of the *Regulations*, the Board finds that the minimum self-service and full-service retail margins should increase by 0.3 cpl, and the maximum self-service retail margin should increase by 0.4 cpl.

[73] As a result, the minimum retail margin for self-service and full-service will increase to 5.1 cpl, and the maximum for self-service will increase to 7.0 cpl, from 4.8 and 6.6, respectively.

## **6.2 Should the transportation allowance be increased in any or all of the zones? If so, by what amount?**

### **(a) Evidence**

[74] On December 14, 2015, Irving filed its evidence in support of the Transportation Allowance Application. The requested increase is a flat 0.1 cpl for all six zones.

[75] In his opening statement Mr. Fournier, on behalf of Irving, noted that transportation costs have increased:

Since 2011, Irving Oil's costs to deliver specified petroleum products to each of the six defined zones in the Province have further increased. As a result, the present transportation allowances in each zone have eroded the objective of providing for the recovery of the cost of delivering petroleum products to retailers throughout all of Nova Scotia.

[Opening Statement, Exhibit I-10, p. 1]

[76] In response to Board IR-1, Irving Oil outlined how the transportation costs are determined for the company:

First is the cost per kilometre which [Irving] refers to as line haul costs. This calculation uses a static loading charge and a charge per kilometre using a base ULSD (Ultra Low Sulphur Diesel) fuel costs.

Second is the fuel surcharge. This is a percentage calculation which represents the difference between the base fuel cost used in the line haul calculation and the actual retail ULSD prices in each province. The line haul cost is multiplied by the Fuel Surcharge percentage to adjust for changes in the price of ULSD.

The final component refers to accessorial fees...

[Exhibit I-3, pp. 1-2]

[77] On questioning from the Board, Irving's witnesses indicated they were confident that the proposed transportation allowances would not result in any cross-subsidization between zones. They stated that within any particular zone, an average had to be applied to determine the costs applicable to that zone.

[78] Irving elaborated on this in response to Board IR-2d as follows:

The amount requested in exhibit I-1 is based on the overall average cost increases experienced by [Irving] on a \$ per litre basis on all its volumes for all zones between 2011 and 2014. [Irving] believes that the overall cost increases across the volumes delivered to all 84 locations that existed in both 2011 and 2014 is representative of the transportation cost increases that have been experienced as a whole. [Irving] believes that increasing the transportation allowances for each zone by the overall amount of the increase is a reasonable approach given that the same type of cost increases are incurred consistently across the zones.

[Exhibit I-3, pp. 3-4]

[79] Further, in response to Board staff IRs, Irving also noted that the rates charged to Irving are market-based costs to deliver fuel to the same 84 retail outlets as referenced in the last application. There are, as of 2015, 401 retail outlets in Nova Scotia, and, in the opinion of Irving, its rates are generally representative of the industry in Nova Scotia.

[80] Irving suggested that the increase in its transportation allowance be added to the current allowances. This is based on the premise that the original transportation allowances were reasonable, which was the same methodology accepted by the Board in 2011.

[81] Board Counsel questioned Mr. Fournier whether a rebasing of the transportation allowance by zone would be more appropriate. Mr. Fournier noted that Irving would be supportive to the idea of a rebasing of allowances on actual costs in a future application. Irving suggested that its actual costs or the actual costs of the broader industry could be considered.

[82] The Board's consultant, Levy Casey, reviewed Irving's information and submitted a report on February 3, 2016. Levy Casey concluded:

The procedures we have performed on Irving's cost per litre figures in Exhibit I.2(C) have determined that Irving's calculations appear to be done correctly and the majority of samples selected by us on the raw data appear to exist and be recorded properly... Our sample selection is not large enough to conclude on whether the samples we have selected are statistically representative of the entire population of transactions but we can confirm that there were limited issues with any of the samples we did perform procedures on.

We have also offered qualitative analysis that indicates a 0.1 cent per litre increase in the transportation allowance is reasonable when considering both the increase in Irving's costs since 2011 and their overall costs as a whole.

As this application was made by Irving, all of our analysis was done on data provided by Irving and does not include information from other wholesalers. Our analysis on whether a 0.1 CPL increase is reasonable is based solely on Irving's information and may not reflect the costs of other wholesalers in Nova Scotia.

[Exhibit I-5, p. 19]

[83] Both the CA and the Board questioned Levy Casey about the statistical significance of the number of transactions they had reviewed. The activity reviewed, when compared to the total number of transactions is very small and, accordingly, they said the results are not statistically significant. Increasing the number of transactions reviewed:

...would be excessive and time prohibitive. As a result, we have used our professional judgement to select a sample size of 48 transactions, which can give an indication of the reliability of the data but is not a statistical representation of the entire population.

[Exhibit I-5, pp. 9-10]

[84] Levy Casey concluded that sufficient testing was done:



Based on our procedures, Irving's CPL figures appear to be recorded accurately and, at least for the samples that were selected, the transactions appear to exist and be recorded accurately. Although our sample size is not a statistical representation of the population, it is an indication of the accuracy of information provided by Irving.

[Exhibit I-5, p. 12]

[85] One letter of comment was received from the public suggesting that the Board not allow any increase in the transportation allowance for Cape Breton. The letter made some observations about how the writer believed gasoline was being transported to Sydney, which should then eliminate a need for the transportation allowance for Cape Breton.

[86] During the hearing, the CA did not dispute that transportation costs have increased, nor did he provide any additional evidence to suggest the allowances for any or all zones should not be increased.

**(b) Submissions**

[87] In its closing submission, Irving reiterated its position that an increase of 0.1 cpl is warranted to reflect the average increase in costs incurred across all six zones, since the Board last adjusted rates.

[88] Irving further indicated that although it is supportive of a move to round the transportation adjustment, and increase, to the second decimal place, it acknowledges that rounding to the one-tenth may be more representative of cost and operations within the industry.

[89] In his closing submission, the CA stated that he agrees, based on the evidence and the review by Board Consultants, that a transportation allowances increase of 0.1 cents in each of the six zones is warranted.

[90] SNS did not oppose the Transportation Allowance Application, and made no submissions on the issue.

**(c) Findings**

[91] The Board has three concerns about this Application. First, the increase is an “add-on” to an “add-on” to base data which was last fully examined in 2006; second, the data is from only one company that transports petroleum products; and third, it relies on data that, itself, is extracted from original financial information which is used to prepare formal statements and which has not been statistically verified.

[92] On the first concern, the Board finds that since the last “add-on” was approved five years ago, operating costs have increased and adjustment of the transportation allowance is warranted. Since the setting of the original base rates, the source of fuel and the delivery points have changed. As such, a future application should consider rebasing all of the transportation allowances based on a full costing, with the new logistics of delivery.

[93] Regarding the second concern, the Board finds that Irving has demonstrated sufficient market presence in Nova Scotia to be representative of the costs for the whole industry. The calculations based on Irving’s experience are, in the view of the Board, sufficient to be a proxy for all of the industry. In future applications, industry participants may file their own data if they consider it appropriate.

[94] Finally, the Board’s consultants used an approach favoured by auditors, which has been accepted by the markets as sufficient to verify financial statements. It may likely cost as much as the total increase in the overall allowance to obtain greater statistical assurance.

[95] Taking the above into account, the Board finds an increase of 0.1 cpl to be reasonable across all zones.

## 7.0 CONCLUSION

[96] Taking into account all of the evidence and submissions in this proceeding, the Board approves, in part, both the Retail Margin Application and the Transportation Allowance Application, pursuant to s. 24 of the *Regulations*. The Board considers that its approval of the applications will foster the objectives of the *Regulations*, including preserving availability of regulated petroleum products in rural areas and minimizing the variances of prices across the Province.

[97] The Board notes that the increases to the retail mark-ups and transportation allowances approved in this Decision shall apply to all industry participants and shall be incorporated into the Board's weekly setting of regulated petroleum product prices.

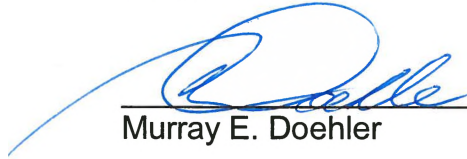
[98] Based on the evidence presented at the hearing, the Board's findings are as follows:

- (1) The Board approves the application, in part, and increases the minimum self-service and full-service mark-up by 0.3 cpl and the maximum self-service mark-up by 0.4 cpl;
- (2) The Board approves the application to increase the transportation allowances in each of the six zones across the province by 0.1 cpl. With respect to future applications for a change to the transportation allowances, the Board considers that any application should be conducted on a rebasing of the costs; and
- (3) The increases to the retail mark-ups and transportation allowances approved in this Decision shall be incorporated into the Board's weekly setting of gasoline and diesel oil prices, effective 12:01 a.m. Friday, October 28, 2016.

**DATED** at Halifax, Nova Scotia, this 26<sup>th</sup> day of September, 2016.



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Roland A. Deveau



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Murray E. Doehler



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Roberta J. Clarke .