

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION by **NOVA SCOTIA POWER INCORPORATED**
for Approval of its 2020-2022 Fuel Stability Plan, including 2020-2022 Base Cost of Fuel
Forecast Reset, 2017-2018 Actual Adjustment/Balance Adjustment (AA/BA) amounts
under the Fuel Adjustment Mechanism (FAM) and direction on the 2019 AA/BA amounts

BEFORE: Peter W. Gurnham, Q.C., Chair
Roland A. Deveau, Q.C., Vice Chair
Steven M. Murphy, MBA, P.Eng., Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
Brian Curry
Judith Ferguson

INTERVENORS: **CONSUMER ADVOCATE**
William Mahody, Q.C.
Emily Mason

SMALL BUSINESS ADVOCATE
E.A. Nelson Blackburn, Q.C.
Melissa MacAdam

AFFORDABLE ENERGY COALITION
Peter Duke
Brian Gifford

ALTERNATIVE RESOURCE ENERGY AUTHORITY
Donald Regan
Aaron Long

INDUSTRIAL GROUP
Nancy G. Rubin, Q.C.
Brienne E. Rudderham

NOVA SCOTIA DEPARTMENT OF ENERGY AND MINES
Peter Craig

NOVA SCOTIA ENVIRONMENT
Michelle Miller

PORT HAWKESBURY PAPER LP
James MacDuff

BOARD COUNSEL: S. Bruce Outhouse, Q.C.

HEARING DATE(S): October 15, 2019

FINAL SUBMISSIONS: November 22, 2019

DECISION DATE: **December 6, 2019**

DECISION: **The Board approves the 2020-2022 Base Cost of Fuel amounts and revised AA and BA amounts.**

TABLE OF CONTENTS

1.0	SUMMARY.....	4
1.1	Fuel Stability Period and Base Cost of Fuel.....	4
1.2	Application of AA/BA.....	4
1.3	Medium and Large Industrial Class.....	5
1.4	Treatment of NS Power’s excess earnings.....	5
1.5	Directions for Future BCF Applications.....	5
2.0	BACKGROUND.....	6
3.0	ISSUES AND FINDINGS.....	9
3.1	Creation of a three-year Fuel Stability Period and smoothing of rates.....	9
3.1.1	Findings.....	10
3.2	2020-2022 BCF and application of AA/BA amounts.....	10
3.2.1	Base Cost of Fuel.....	10
3.2.1.1	Findings.....	12
3.2.2	AA/BA (Actual versus Forecast Fuel Costs).....	13
3.2.2.1	Findings.....	17
3.2.3	AA/BA calculation.....	20
3.2.3.1	Findings.....	21
3.3	Amendments to FAM Plan of Administration.....	22
3.3.1	Findings.....	22
3.4	One-time on-bill credit of improved 2019 results.....	23
3.4.1	Findings.....	24
3.5	Treatment of the 2019 Maritime Link depreciation credit.....	25
3.5.1	Findings.....	25
3.6	Proposed treatment of the Medium and Large Industrial Classes.....	25
3.6.1	Findings.....	26
3.7	Mechanism to return overearnings to customers.....	27
3.7.1	Findings.....	28
3.8	Bates White recommendations for improvements of future filings.....	40
3.8.1	Findings.....	41
3.9	The FAM incentive.....	42
3.9.1	Findings.....	42
4.0	COMPLIANCE FILING.....	42

1.0 SUMMARY

[1] Nova Scotia Power Incorporated (NS Power or Utility) applied to the Board for approval of a three-year Fuel Stability Plan incorporating rates for NS Power's Base Cost of Fuel (BCF) for 2020-2022 and 2017-2019 AA and BA riders. NS Power requested that the BCF and the proposed 2017-2019 AA/BA adjustments be smoothed to provide overall rate increases averaging 1.9% per year for all Fuel Adjustment Mechanism (FAM) classes.

1.1 Fuel Stability Period and Base Cost of Fuel

[2] The Board approves the three-year Fuel Stability Period and the rate smoothing mechanism. The Board approves the total BCF amounts attributable to FAM customers of \$654.0 million, \$658.3 million and \$656.2 million for the years 2020, 2021 and 2022, respectively. The foregoing BCF budgets include amounts NS Power will recover from customers for the interim assessment for the Maritime Link of \$144.5 million (2020), and forecasted assessments of \$164.4 million (2021) and \$161.9 million (2022).

1.2 Application of AA/BA

[3] NS Power proposed to use projected fuel costs for the months of May to December, 2019, rather than actual data. The Board finds that NS Power must use actual data to the end of September 2019, and any fuel cost adjustments related to the Q4 2019 period will be canvassed in the next AA/BA process in Q4 2022. The effect of pushing the Q4 (October to December 2019) forecast under-recoveries as part of the next AA/BA process in Q4 2022 will translate into a benefit of \$30.6 million in favour of ratepayers that can serve to reduce NS Power's proposed rate increases. This will reduce NS Power's average rate increase of 1.9% per year by about 0.4%.

[4] The Board directs NS Power to apply an approximate AA/BA balance of \$140.4 million in the Compliance Filing, resulting in revised AA and BA riders. The Board also approves a one-time AA/BA fuel credit in 2020 if there is a balance greater than \$10 million owed to ratepayers at the end of 2019, resulting from any fuel cost over-recovery for the last three months of 2019, as well as any 2019 overearnings.

1.3 Medium and Large Industrial Class

[5] Given that the Board has approved the return of the 2019 Maritime Link depreciation amount as an on-bill credit in 2020 for Medium and Large Industrial class customers, those customers will not be eligible to receive the above on-bill AA/BA credit. The Board directs that the increases to the Medium and Large Industrial customers be capped at three percent per year, with a deferral for that class of about \$14.8 million.

1.4 Treatment of NS Power's excess earnings

[6] The Board denies NS Power's proposal to create a new fund related to the treatment of its excess earnings. The Board has concluded that it does have the jurisdiction to determine the disposition of earnings above NS Power's allowed rate of return. The Board orders that annual overearnings during the 2020-2022 Fuel Stability Period be applied to the FAM balance. However, if NS Power files a general rate application during that period, it may, as part of that filing, seek an amendment to this Order.

1.5 Directions for Future BCF Applications

[7] The Board provides direction to NS Power with respect to its filings for future BCF Applications.

2.0 BACKGROUND

[8] NS Power applied to the Nova Scotia Utility and Review Board on June 27, 2019, for approval of a three-year Fuel Stability Plan for the period 2020 to 2022 incorporating rates for NS Power's BCF for 2020-2022 and 2017-2019 AA and BA riders. NS Power also sought direction from the Board that the requirements for the revised AA/BA process approved by the Board in July 2018 do not apply in order to allow for inclusion of the 2019 AA/BA amounts forecast at the time of the application in the 2020-2022 Fuel Stability Plan. Further, for the 2020-2022 Fuel Stability Period, NS Power requested that the BCF and the proposed 2017-2019 AA/BA adjustments be smoothed to provide overall rate increases averaging 1.9 percent per year for all FAM classes. The Board will refer to all these requests, collectively, as the application.

[9] A FAM is a mechanism that allows adjustments to customer rates to reflect increases and decreases in a utility's cost of fuel, provided they are prudently incurred. Under the FAM, fuel is a direct pass-through cost to customers. Thus, customers only pay NS Power's actual fuel costs. This does not change under the proposed Fuel Stability Plan. Actual fuel costs will be tracked during the duration of the Fuel Stability Period and trued up (through the AA/BA process) at the conclusion of the Fuel Stability Period, which ends December 31, 2022.

[10] The FAM has three components: the BCF, the AA, and the BA. The AA and BA are described below. The FAM is administered in accordance with a Plan of Administration (POA). Under the FAM POA, NS Power is required to file an application to reset its BCF every second year or during a general rate application. If approved by the Board, the BCF is then reflected in rates, which are typically effective the following 1st day of January. The AA and BA are subsequent adjustments (or true-ups) to the BCF to

account for actual versus forecast fuel costs. The AA, and the BA, are normally calculated and applied annually under the POA in a process referred to as the AA/BA process. The BCF and AA/BA process, working together, ensure that customers only pay actual fuel costs, no more and no less.

[11] As noted above, in this case NS Power has applied to set the BCF for the three-year period from 2020 to 2022. It has also requested to confirm the 2017-2019 AA/BA adjustments, using actuals only up to April 30, 2019, and forecasts for the remainder of 2019. The Board previously directed NS Power to use actuals up to September 30th in applying the annual AA/BA process. NS Power seeks approval from the Board for the 2019 AA/BA amount forecast in the application for May to December 2019 to be included in FAM AA/BA rates for 2020. With this proposal, the next AA/BA process would occur at the end of 2022.

[12] There were difficulties with the original application. As explained in greater detail later in this Decision, the supporting spreadsheets filed with the application did not demonstrate that the BCF budgets translated into the proposed BCF rates. When explained through responses to Information Requests (IRs), NS Power indicated in a summary (IR-1) that if the proposed rates were approved, there would be an additional \$107.7 million in non-fuel revenue. This was an unintended result of NS Power's presentation of the BCF and AA/BA balances. Moreover, while NS Power had updated its commodity pricing forecasts in its Reply Evidence, which resulted in \$50.7 million of savings in fuel costs compared to what was originally projected, and a further \$6.8 million in interest forecast to be owed to customers, NS Power did not update its rates. While these savings admittedly erased a projected \$44 million FAM balance deferral, the rate formulas were not recalculated. In fact, a number of data fields in the supporting

spreadsheets were “hard-coded” with certain figures to maintain the originally proposed rates.

[13] On the Thursday afternoon prior to the start of the hearing the following week, NS Power filed a letter providing “additional clarification” and “corrections” to a number of IRs in this proceeding, including various supporting spreadsheets for the proposed rates. NS Power acknowledged that its application contained errors which were only brought to light through questioning from Bates White, Board Counsel’s consultants, and Board advisory staff. Further revisions to some spreadsheets and the summary to IR-1 were filed following the hearing as Undertakings.

[14] In the end, the Board is satisfied that the proposed BCF budget will now be aligned with the BCF revenue requested through rates in NS Power’s application, as adjusted in this Decision. However, NS Power’s filings caused the entire matter to be much more complicated than it should have been and required a greater level of resources and effort by all parties involved.

[15] A total of nine formal Intervenors responded to the Notice of Public Hearing. A number of these parties were represented at the hearing by counsel. The following Intervenors participated at the hearing: the Consumer Advocate (CA); the Small Business Advocate (SBA); a group of 11 large industrial customers represented by counsel (Industrial Group); Affordable Energy Coalition (AEC); Alternative Resource Energy Authority (AREA); the Nova Scotia Department of Energy and Mines (Province or NSDOEM); and Port Hawkesbury Paper LP (PHP).

[16] S. Bruce Outhouse, Q.C., acted as Board Counsel.

[17] The Notice of Public Hearing advised members of the public that they could file written submissions with the Board or appear at an evening session to outline their

views regarding the application. The Lower Power Rates Alliance asked to speak and it provided a short presentation at the hearing.

3.0 ISSUES AND FINDINGS

3.1 Creation of a three-year Fuel Stability Period and smoothing of rates

[18] NS Power cited several factors in support of its application for a three-year Fuel Stability Period and its application for rate smoothing over those three years.

[19] Certain circumstances have developed which provide rate relief for customers:

- There will be a significant credit in favour of customers in the FAM balance at the end of 2019.
- \$53.6 million in 2020 Maritime Link depreciation credits are available.
- There is a DSM HST rebate available in favour of customers available, which stands at \$15.3 million as of June 3, 2019.
- Provincial Government has committed to make changes to sulfur dioxide emission requirements to reflect the delay in the delivery of Muskrat Falls energy.

[20] NS Power's evidence also shows that, without smoothing, there would be significant uneven rate changes for customers over the next three years.

[21] All of these circumstances combined have caused NS Power to ask for a new three-year Fuel Stability Plan.

[22] All parties and customers have had experience with the current 2017-2019 Rate Stability Plan, so this is not something entirely new.

[23] Separate rate calculations were requested by the Medium and Large Industrial Classes, which is dealt with elsewhere in this Decision.

3.1.1 Findings

[24] All parties to the proceeding appear to support both the three-year Fuel Stability Period and the concept of rate smoothing.

[25] The Board accepts the rationale proposed by NS Power and approves the three-year Fuel Stability Period and the rate smoothing mechanism.

[26] In this Decision, the Board adjusts the BCF and AA/BA amounts which will ultimately be reflected in rates. However, the smoothing mechanisms proposed by NS Power are accepted and should be applied in a similar manner to the BCF amounts as established by the Board. Exact rates will be disclosed by NS Power in a Compliance Filing.

3.2 2020-2022 BCF and application of AA/BA amounts

3.2.1 Base Cost of Fuel

[27] In its original application, NS Power forecasted fuel and purchased power costs (hereinafter referred to collectively as fuel costs), for FAM and non-FAM customers combined, of \$733.8 million (2020), \$738.7 million (2021) and \$732.1 million (2022). However, the forecast revenues would have resulted in a deferred FAM balance of approximately \$44 million for collection from customers following the 2020-2022 Fuel Stability Period.

[28] Bates White filed evidence in which it recommended that NS Power update its unhedged fuel forecasts before setting BCF rates. For instance, it noted that coal price forecasts had decreased since the original application.

[29] In its Reply Evidence filed October 3, 2019, NS Power updated its fuel forecasts and found that commodity pricing changes resulted in \$50.7 million lower costs than originally forecast. This also resulted in an additional \$6.8 million of interest forecast

to be owed to customers. The updated fuel costs also erased the necessity of the \$44 million FAM balance deferral.

[30] Based on its Reply Evidence and Undertaking U-3, NS Power has applied for the following revised amounts to be approved as BCF costs in each of the years during the Fuel Stability Plan:

- The 2020 fuel forecast set at \$716.9 million, of which \$654.0 million is the BCF attributable to FAM customers. Tariffs set to collect \$691.4 million from FAM customers in 2020;
- The 2021 fuel forecast set at \$720.9 million, of which \$658.3 million is the BCF attributable to FAM customers. Tariffs set to collect \$616.0 million from FAM customers in 2021;
- The 2022 fuel forecast set at \$715.9 million, of which \$656.2 million is the BCF attributable to FAM customers. Tariffs set to collect \$641.2 million from FAM customers in 2022;

[31] The foregoing BCF budgets include amounts NS Power will recover from customers for the interim assessment for the Maritime Link of \$144.5 million (2020), and forecasted assessments of \$164.4 million (2021) and \$161.9 million (2022). The amount for 2020 relating to the Maritime Link has been approved in a recent Decision of the Board dated November 27, 2019 [2019 NSUARB 156] in Matter M09277. The forecasted amounts for the 2021 and 2022 Maritime Link interim assessments are proposed to be included in rates, but will be subject to later review, likely in NSP Maritime Link Incorporated's final approval process.

[32] The customer representatives did not challenge the fuel costs comprising the proposed BCF amounts for the respective years. Bates White did suggest NS Power

update its commodity pricing during the proceeding, which resulted in the fuel savings realized in the above revised figures.

3.2.1.1 Findings

[33] Taking all of the above into account, the Board approves the total BCF amounts of \$654.0 million, \$658.3 million and \$656.2 million for the years 2020, 2021 and 2022, respectively. These are the amounts that are attributable to the FAM customers.

[34] The Board notes that the above BCF amounts will result in some residual deferral balances for fuel costs with respect to certain customer groups. For example, the deferral balance for the Residential Class will be \$1.0 million. The Industrial Group requested a larger deferral for its customer classes to accommodate more modest rate increases, resulting in an annual rate cap of three percent for those customers in the 2020-2022 period. The deferral balance for the entire Industrial Group could stand at \$14.8 million as the Fuel Stability Period ends. In the Industrial Group's Closing Submissions, it consented to the deferral balance. The Board approves the above under-recoveries. The Board notes the inherent nature of the FAM results in imbalances, including across different cost of service (i.e., customer) classes. These potential imbalances do not require any deferral mechanism outside of the FAM.

[35] Further, the Board approves the Fuel Stability Plan applicable to the 2020-2022 period on the basis of the above BCF amounts and the rate smoothing mechanisms approved earlier in this Decision. The Board directs NS Power to file a Compliance Filing to reflect the above BCF amounts, along with any other adjustments to reflect the findings elsewhere in this Decision. The Filing should also account for the update to commodity pricing of \$50.7 million lower fuel costs, plus \$6.8 million of interest owing to customers.

3.2.2 AA/BA (Actual versus Forecast Fuel Costs)

[36] As noted earlier in this Decision, this application also addresses the AA/BA process required under the FAM Plan of Administration. In this respect, NS Power proposed to use projected fuel costs for the months of May to December, 2019. In other words, it proposed to only use actual fuel data to the end of April 2019 in applying the AA/BA to the calculation of rate riders. Specifically, NS Power proposed to use its prior forecast under-recoveries and over-recoveries for fuel costs during the period May to December 2019 (instead of actual costs), and to apply those forecast amounts to the AA/BA.

[37] It is noted that NS Power filed its 2020 FAM AA/BA update on October 21, 2019, as an Undertaking in this proceeding.

[38] NS Power has requested a waiver from the requirement to comply with the revised AA/BA process approved by the Board in 2018, which directed NS Power to use actual data versus forecast data in the AA/BA process.

[39] Bates White recommended that actual fuel costs should be used in the AA/BA process, when available.

[40] Before proceeding any further, it may be instructive to provide some context respecting the impact of the different approaches suggested by NS Power and Bates White. In its final Rebuttal to Evidence (Exhibit N-32, p. 3), NS Power noted the difference in the AA/BA credit balances for the respective scenarios:

- BCF Filing (actuals to April 30 & forecast to year-end) = \$107.7 million
- Bates White Proposal (actuals to Sept 30) = \$138.3 million
- NS Power Updated (actuals to Sept 30 & forecast to year-end) = \$129.3 million

[41] The AA/BA balance, of course, is what is applied against the BCF to determine the ultimate rates charged to customers. Since NS Power had projected various under-recoveries of fuel costs in 2019, applying them to the overall AA/BA balance reduces the credit balance. Thus, adopting Bates White's approach of using actual data to the end of September 2019 (and delaying consideration of any recoveries experienced during Q4 2019 to the end of 2022), the AA/BA balance to be applied to reduce the BCF would be \$30.6 million higher (\$138.3 million - \$107.7 million). This would work to the benefit of ratepayers because it would reduce the size of the rate increases proposed by NS Power. The potential reduction in the increase would be about 0.4 percent, according to NS Power.

[42] Bates White explained the reasons for using actual data, when available, in its pre-filed evidence:

E. NSPI Should Use Actual Costs – Not Forecasted Costs – When Available and Practicable

Q. Does Bates White have any suggestions regarding the inclusion of the Actual Adjustment/Balancing Adjustment to the BCF forecast?

A. Yes. As background, NSPI is proposing to use the Application to set the AA and BA for 2020. As noted above, the AA and BA serve to offset the fuel cost increases in setting the New Rates. Combined, the AA and BA are expected to result in significant credits for customers, which serve to reduce the rate increases in 2020.

Importantly, in its Application, NSPI has proposed using *forecasted* costs for all months from May 2019 through December 2019. In our view, this introduces additional uncertainty and potential inaccuracy into the AA and BA process, which is designed to true up the revenues recovered by NSPI from ratepayers – which are based on forecasts – to its actual costs. This is a departure from current Board direction which directed use of actual fuel data to September 30, 2019 with annual AA/BA processes thereafter using an October 1 – September 30 year.

Q. What is Bates White's recommendation to address this concern?

A. We recommend that NSPI update its New Rates to (a) replace multiple months of "forecast" costs with "actual" costs, where available, and (b) remove any forecasted 2019 months from the New Rates for which actual data will not be available. Together, these two recommendations will help the New Rates better reflect the realities of 2019 costs; moreover, this approach can help reduce NSPI's forecasted \$44 million deferral. ... [Emphasis added]

[Exhibit N-12, pp. 14-15]

[43] As noted by Bates White, following an extensive stakeholder consultation process in 2018, the Board approved a revised process for the application of the AA/BA. The Board described the issue in a letter to the FAM Small Working Group dated December 13, 2017:

NS Power has agreed with stakeholders that eliminating the forecast elements of these riders is appropriate. However, the Board is concerned that NS Power's proposed changes to the AA/BA recovery methodology, and related revisions to the POA, do not address one of the primary objectives of this entire exercise.

The issue of the AA calculation methodology and process has been ongoing, without resolution, since at least 2012. In its 2016 FAM AA/BA Decision [2015 NSUARB 257], dated December 10, 2015, the Board reviewed the core issue to be addressed in this review:

5.0 TIMING AND AMENDMENT OF THE AA/BA PROCESS

[22] In past AA/BA proceedings, various stakeholders have raised concerns about the process for approval of the annual AA and BA amounts.

[23] In its December 2014 Decision approving the 2015 AA and BA amounts [2014 NSUARB 204], the Board concluded:

[40] The Industrial Group suggested improvements could be made to the AA/BA process, recommending an effort through the FAM Small Working Group to find a more efficient way to adjust rates that does not involve a true up for November and December fuel forecasts, which can involve a rushed process before year end. The Board concurs that this issue be referred to the Small Working Group.

[Board Decision, para. 40]

[24] This concern has not been resolved. The same issue was raised again in this proceeding.

This issue has been referred back to NS Power and the Small Working Group on various subsequent occasions in the past two years, again without resolution. The current proposal submitted by NS Power does not address the "rushed process" which the Board and stakeholders are required to accommodate annually, prior to year-end.

Accordingly, the Board will initiate a process to ensure that an appropriate solution to this issue is ready to be implemented at the conclusion of the Rate Stability Period.

Board Counsel will engage the Liberty Consulting Group to provide its recommendations respecting an efficient AA/BA recovery mechanism, and distribute a “strawman” model for comment by NS Power and the FAM stakeholders. At this point, the Board intends to initiate a paper process to deal with submissions and the issuance of a decision. [Emphasis added]

[Board Letter, M08317, December 13, 2017, pp. 1-2]

[44] The Board approved a revised process that reflected only actual fuel costs and a more reasonable timeline for dealing with the AA/BA process:

In its letter of December 13, 2017, the Board initiated a process for Liberty Consulting Group (Liberty) to propose recommendations to improve the existing AA/BA process. Liberty provided a Strawman Model, upon which Stakeholders provided comments by April 23, 2018. Comments were received from the Consumer Advocate, Small Business Advocate, Industrial Group and Nova Scotia Power Incorporated (NS Power).

...

The Board notes the proposed annual AA/BA process, as outlined by Liberty, was broadly supported. As such, the Board approves the revised process using October 1 – September 30 actual fuel data. This will begin for the 2019 hearing process for setting the 2020 AA/BA and, annually, thereafter.

[Board Decision Letter, M08656, July 4, 2018, p. 1]

[45] The various Intervenors in the present matter did not comment on the specific issue of the use of actual versus forecast fuel data in the AA/BA process. The Board notes, however, that all customer groups were supportive of the revised AA/BA process adopted by the Board in 2018.

[46] Despite Bates White’s recommendations that actual fuel costs be used in the AA/BA process, NS Power maintained its view throughout this proceeding that forecast data from May to December 2019 should be used. In its Closing Submission, NS Power stated:

None of the intervenors presented evidence opposing NS Power’s proposed AA/BA treatment. In the Company’s view, including forecast AA/BA data to the end of 2019 provides the greatest degree of transparency in setting fuel rates over the next three year period.

The revised process for the AA/BA approved by the NSUARB was developed in the context of one-year fuel rate adjustments. If NS Power were to follow the AA/BA process as currently approved, the Q4 2019 actual AA/BA amounts would not be factored into rates until the fall of 2022 and would not be included until 2023. If those amounts result in an under-recovery, then there would be interest charged at NS Power’s WACC associated

with those amounts. Using a forecast for Q4 2019 will minimize any interest implications associated with carrying that balance for a further three years. ...

[Exhibit N-26, pp. 10-11]

[47] In its Final Rebuttal to Evidence, NS Power stated:

If NS Power were to follow Bates White's recommendation and only use actuals to the end of September 2019 (and remove the forecast for the months of October, November and December), there would be a relatively small reduction to the 1.9 percent average rate increase (estimated to be approximately 0.4 percent) and, based on the best information available, a forecast year end 2022 FAM AA/BA balance of approximately \$11 million (inclusive of interest) owed by customers. However, the impact of the small reduction in rates over the 2020 -2022 period combined with the \$11 million forecast under recovery will result in an approximate 1.5 percent rate gap (or approximately 1.5 percent additional rate pressure) going into 2023.

[Exhibit N-32, p. 3]

3.2.2.1 Findings

[48] The application of the AA/BA is intended to be a straightforward calculation which reflects NS Power's over-recovery or under-recovery of actual fuel costs from its ratepayers, along with various other adjustments to the AA/BA balance as directed by the Board. However, in this and past proceedings, the use of forecasted over-recoveries and under-recoveries, rather than actual amounts, and the compressed timing of the AA/BA process (typically late in the calendar year), has caused frustration for the various customer representatives and the Board.

[49] As noted earlier in this Decision, the Board approved a clearer AA/BA process to avoid the uncertainty over actual versus forecast costs, and to provide a more reasonable timeline for consideration of the AA/BA. The Board directed that actual fuel data for the twelve-month period from the prior October 1st to September 30th in the current year would be used in the annual AA/BA processes. Any resulting over-recoveries or under-recoveries over the following October to December three-month period (i.e., Q4) would be addressed in the next AA/BA process. In the case of annual AA/BA applications, the actual data in Q4 of the current year would be applied the

following year. In the event of a three-year fuel stability plan, like the current Rate Stability Period ending December 31, 2019, the October to December (2019) actual data would be applied in the next AA/BA process three years hence, on September 30th. This is what the Board contemplated when it revised the AA/BA process to adopt the “Liberty Consulting model” in 2018. The revised process was clearly directed to be first applied at the end of the 2017-2019 Rate Stability Period.

[50] The Board accepts the evidence of Bates White that using forecast data “introduces additional uncertainty and potential inaccuracy into the AA and BA process”. In the Board’s view, this situation is unnecessary and can be easily avoided by applying the revised process approved by the Board in 2018. The Board considers that the use of the forecast data by NS Power led to some of the complexity and confusion in its present application.

[51] The Board does not accept NS Power’s submission that the use of forecast fuel data will increase transparency. In the Board’s opinion, the use of forecast data actually does the opposite – it decreases transparency about fuel costs and their impact on the rate setting process. If adopted, NS Power’s submission would have the absurd result of requiring the Board to apply forecast fuel costs that the Board knows to be wrong for the six-month period April to September 2019. In the words of Bates White, that “introduces additional uncertainty and potential inaccuracy in the AA and BA process”. These difficulties can be simply avoided by using actual data.

[52] As noted earlier, using actual data in accordance with the Board’s approved process (i.e., up to September 30, 2019) will have the effect of pushing the Q4 (October to December 2019) forecast under-recoveries for consideration as part of the next AA/BA process after September 30, 2022. In the present case, this will translate into a benefit

of \$30.6 million in favour of ratepayers that can serve to reduce NS Power's proposed rate increases.

[53] While NS Power originally submitted that its proposed use of forecast fuel costs for the period May 1 to December 31, 2019, would have helped mitigate rate pressures at the end of the Fuel Stability Period in 2022 by about \$31.9 million, the Board notes that actual data experienced in 2019 has already reduced the forecast deferral amount to about \$11.4 million, thereby reducing the potential rate pressures beginning in 2023.

[54] Further, as noted by the Industrial Group in its Closing Submissions (with respect to its proposed deferral of fuel costs and 3% rate cap), there are other potential factors which may mitigate later rate pressures:

In Response to Undertaking U-3, NSPI, updated the forecasted deferral amounts at the end of 2022. These amounts incorporate the improvements in commodity pricing but do not account for the possibility of excess earnings in 2019 (nor any other year), nor for any contribution to the FAM from the proposed PHP Active Demand Control tariff, nor from the return of any NSPML benefits holdback. It is possible (and perhaps likely) that these will decrease the size of the forecasted deferral.

[Exhibit N-28, p. 3]

[55] In its evidence, Bates White noted that in 24 out of the first 30 months of the 2017-2019 Rate Stability Period, NS Power's estimated fuel costs (upon which rates were based) were higher than the costs that were actually incurred. This led to over-recoveries from customers in each of those months.

[56] Taking all of the above into account, the Board considers that the public interest weighs in favour of reducing NS Power's average rate increase of 1.9% per year by about 0.4%. While NS Power characterized this decrease as a "relatively small reduction", the Board is mindful that even small decreases will help Nova Scotians manage their household and business expenses. The Board recognizes that this may

potentially result in a deferral of Q4 2019 forecast under-recoveries which would have to be reflected in rates at the end of the 2020-2022 Fuel Stability Plan. However, the Board notes these are still forecast amounts, which could change up or down over the final three months of 2019, and carried over the term of the Fuel Stability Period, with interest. Given the magnitude of the inaccuracy of fuel forecasts over 2019, at least to the end of September 2019, which has improved from a projected under-recovery of about \$19.3 million to an under-recovery of \$10.3 million between May 1st and September 30th, the Board considers, on the balance of probabilities, that it is in the public interest to choose an immediate reduction in the proposed rate increases and to deal with any potential deferral of the Q4 2019 forecast recoveries at the end of the Fuel Stability Period. The Board also notes that there will be other changes to the overall AA/BA balance, up and down, over the course of the next three years, of which the Q4 2019 deferral will only be a part.

[57] The Board concludes that its existing direction on the use of actual fuel data is to be used in the AA/BA process and applied to the BCF in this matter. The Board denies NS Power's request to use forecast AA/BA data from May 1 to December 31, 2019. It directs NS Power to apply actual fuel costs to the AA/BA up to September 30, 2019, based on the AA/BA period ending the same date. This actual data is to be reflected in the Compliance Filing for the calculation of rates. Any fuel cost adjustments related to the Q4 2019 period will be canvassed in the next AA/BA process in Q4 2022.

3.2.3 AA/BA calculation

[58] A number of AA and BA amounts were identified during the hearing process. In NS Power's application the AA/BA was \$107.7 million (\$43.8 million AA and \$151.4 million BA). The Board understands this included the \$53.6 million Maritime Link

credit, and the EfficiencyOne DSM HST rebate of \$15.3 million (as of June 3, 2019), and various elements of forecast for 2019.

[59] This net figure was revised by NS Power to reflect a \$14.8 million deferral requested by the Industrial Group.

[60] The Board understands the proposed AA/BA did not include the \$2.1 million contribution related to Port Hawkesbury Paper, which was directed by Decision letter dated September 23, 2019, to be applied to the FAM in 2019.

3.2.3.1 Findings

[61] As noted above, the Board has directed the use of actual AA/BA balances through September 30, 2019, and deferral of Q4 2019 under-recoveries or over-recoveries to the end of the 2020-2022 Fuel Stability Period. The Board further directs that the previously directed top-up payment associated with PHP be applied to the 2019 AA/BA.

[62] Accordingly, based on actual balances as presented in NS Power's response to Board IR-34 (noting the Industrial Group custom rate request), the AA/BA balances are to be adjusted as shown in the following table:

	AA	BA	AA/BA with estimated interest
NS Power Application	\$43.8/\$49.5 with IG	(\$151.4)	(\$107.7)/\$102 with IG
Actual through Sept 2019	(\$9.1)	\$0.5*	(\$8.5)
Eliminate Oct-Dec forecast	(\$24.5)	\$2.4*	(\$22.1)
Include PHP		(\$2.1)	(\$2.1)
Revised AA/BA	\$10.2	(\$150.6)	(\$140.4)

* Assumed to be estimate of interest

[63] Any of the above amounts that include interest must be updated to reflect actual interest as of September 30, 2019.

[64] As noted elsewhere in this Decision, NS Power's presentation of this application was affected by an error in its supporting spreadsheets. This led to confusion and inaccuracies in some of the calculations, which resulted in some conflicting evidence. The Board notes that the FAM is subject to audit.

[65] The Board directs NS Power to apply the above AA/BA amounts in the Compliance Filing, resulting in revised AA and BA riders.

3.3 Amendments to FAM Plan of Administration

[66] NS Power has applied for amendments to the POA documentation to reflect its current practices and the proposed Fuel Stability Period. The revisions include provision for a further three-year Fuel Stability Period from 2020–2022; updates arising from the cap-and-trade regulations; changes to the AA/BA process approved by the Board in 2018 as described earlier in this Decision; updates to the chart of accounts; removal of the treatment of earnings for the South Canoe and Sable wind projects; and various amendments to the POA appendices. NS Power also undertook to file the updated FAM Calculation model and Word Calculations as part of its Compliance Filing.

[67] These amendments to the POA were not opposed by the Intervenors.

3.3.1 Findings

[68] The Board approves the amendments to the POA and appendices. To the extent that any of the Board's findings in this Decision require changes to the proposed amendments or other amendments entirely, any such revisions should also be reflected in the Compliance Filing.

3.4 One-time on-bill credit of improved 2019 results

[69] To address a concern that a significant over-recovery of costs would not be returned to ratepayers, NS Power proposed that any difference between the actual fuel recovery at the end of 2019 in excess of \$10 million compared to what was forecast for 2019 in its application, would be credited to customers through a one-time on-bill payment in 2020. This proposal was based on the assumption that the Board would accept NS Power's proposed AA/BA treatment (i.e., a \$107.7 million AA/BA over-recovery balance at the end of 2019). As an exception to this proposal, NS Power stated that if the Board approves the return of the 2019 Maritime Link depreciation amount as a credit in 2020 for Medium and Large Industrial class customers, those customers would not receive the AA/BA credit.

[70] During the hearing, NS Power confirmed that this proposal was also a means to return 2019 non-fuel excess earnings to customers:

Q. (Board Counsel) I misunderstood the variance formula. I thought it just related to the projected under recoveries for October, November and December. But it includes any excess non-fuel earnings and it also includes, if I understood Ms. Godbout correctly, any changes arising out of the up to date end of September information that's going to be provided in a few days. All of that goes into determining whether there is a sufficient variance which will then get dealt with on a one-time bill credit.

A. (Godbout) Small clarification, Mr. Outhouse.

Q. Go ahead.

A. (Godbout) It would be any variance from the actuals to forecast to the end of April. So, we have not adjusted for the actuals to the end of August, which is a small number. If the number in total from May 1st through to the end of the year exceeds what we included as forecast by \$10 million including amounts associated with non-fuel revenues above our range of return for 2019, then that amount would be returned via the on-bill credit. That's what we've proposed.

[Transcript, pp. 80-81]

[71] Generally, the nature of the AA/BA is such that balances are supposed to be adjusted annually, reducing the risk of a material balance accruing in the FAM. With

the 2017-2019 Rate Stability Plan about to end with an approximately \$140.4 million balance owed to customers, it appears that actual fuel costs do not always align with forecasts. Nonetheless, the Board understands that all parties support delaying the annual AA/BA process to the end of the proposed 2020-22 Fuel Stability Period.

3.4.1 Findings

[72] NS Power put forward its on-bill AA/BA credit proposal in exchange for the Board allowing the Utility to keep its AA/BA forecast element in 2020-2022 rates. As noted earlier in this Decision, the Board has rejected NS Power's proposed treatment of the 2019 AA/BA for the 2020-2022 Fuel Stability Period. This notwithstanding, the risk remains that a material AA/BA balance could be left sitting in the FAM for the proposed 2020-2022 Fuel Stability Period. In fact, with the updated AA/BA information provided by NS Power in IR-34, the forecast under-recovery for Q4 2019 has already dropped to \$11.4 million.

[73] Given the Board's finding that forecast 2019 AA/BA amounts are not to be included in 2020-2022 rates, a one-time credit is not needed to resolve concerns related to the 2019 AA/BA forecasts. However, the Board finds that it remains a useful mechanism to ensure a material AA/BA balance does not remain for the full three-year Fuel Stability Period. As such, the Board approves a one-time AA/BA fuel credit in 2020 if there is a balance greater than \$10 million owed to ratepayers at the end of 2019, resulting from any fuel cost over recovery for the last three months of 2019, as well as any 2019 overearnings. Given that the Board has approved the return of the 2019 Maritime Link depreciation amount as a credit in 2020 for Medium and Large Industrial class customers, those customers will not be eligible to receive this on-bill AA/BA credit, but it will be applied to their outstanding FAM balance.

3.5 Treatment of the 2019 Maritime Link depreciation credit

[74] NS Power has requested inclusion of the 2019 Maritime Link depreciation credit in the FAM balance as an offset to rates for all customer classes, saving and excepting the Medium and Large Industrial Customer Classes. Absent a new Order, the credit would be refunded to customers by way of an on-bill adjustment.

[75] NS Power's request appears to be acceptable to the Intervenors and helps facilitate the three-year Fuel Stability Plan and rate smoothing.

3.5.1 Findings

[76] The Board approves the inclusion of the 2019 Maritime Link depreciation credit in the FAM balance as requested by NS Power. Medium and Large Industrial Customer Classes are dealt with separately in the next section of this Decision.

3.6 Proposed treatment of the Medium and Large Industrial Classes

[77] The Industrial Group supports rate smoothing as proposed by NS Power. However, it has requested the increases to the Medium and Large Industrial customers be capped at three percent per year and that the 2019 Maritime Link depreciation and deferred financing amounts be returned by an on-bill credit and not applied to the FAM.

[78] The Industrial Group noted that return of the Maritime Link depreciation credit to customers following year end is consistent with the Board's 2017 Interim Assessment Order.

[79] Ms. Rubin, on behalf of the Industrial Group, in her final argument stated:

While the Board certainly has the authority to vary a previous Order, the same good reasons for ordering return of the Maritime Link depreciation and deferred financing costs by way of a credit continue to exist – to offset the replacement energy costs and near-term rate impacts. In this case, for the Industrial Group members at least, the near term rate impact (if approved by the Board) is a 3% increase year-over-year (as compared to 1.5% in the prior three year period). The credit will help to mitigate known near-term rate impacts.

In future, as a result of applying a 3% per year rate increase, the Industrial Group acknowledges that all else being equal, the Large and Medium Industrial classes will face a forecasted deferral associated with the lower rates and the on-bill credit in 2020.

As confirmed by David Hoffman of Oxford Frozen Foods Ltd., in the evidence filed on behalf of the Industrial Group, this risk is understood and accepted.

NSPI did not contest the requested lower rate and deferral.

The Board did query whether the Industrial Group's request for a lower rate and resulting deferral would impact any of the other ratepayers. It would not. Consistent with the FAM Plan of Administration, NSPI testified that fuel costs and revenues are tracked and rates set separately for each class. It was confirmed by NSPI that there would not be any cross-subsidization and a deferral for the Industrial Group would not negatively impact any other ratepayers. As stated:

The nature of FAM is to track individual class fuel cost and balances separately to ensure that no class subsidizes any other class or takes advantage of any other class. [Emphasis in original]

[Exhibit N-28, p. 2]

[80] NS Power indicated that it is willing to implement the individualized requests and has, in fact, done so in the past during the 2017-2019 Rate Stability Plan.

3.6.1 Findings

[81] The Board approves the three percent rate treatment as requested by the Medium and Large Industrial Rate Classes and return of the 2019 Maritime Link depreciation amount as an on-bill credit in 2020. As noted in the evidence of David Hoffman, CEO of Oxford Frozen Foods, these customers are often energy intensive businesses with electricity being a significant cost in their operations. He indicated a known three percent increase per year can be planned and managed acceptably, particularly where the Maritime Link credit offers some relief in 2020. There is the potential that these customers, at the end of the Fuel Stability Period, would end up with a larger deferral than might otherwise be the case without the capping.

[82] However, members of the Industrial Group are sophisticated participants in the regulatory process and the Board is satisfied they would understand and have taken

into account the potential for a larger deferral and a rate increase at the end of the period. Collectively they have made the judgement to assume that risk.

3.7 Mechanism to return overearnings to customers

[83] Since 2007, excess earnings by NS Power have been applied for the benefit of ratepayers through various mechanisms. When the Section 21 tax deferral existed, funds were used to reduce that deferral. In recent years those funds have been applied directly to ratepayers through the FAM. Based on information filed by NS Power, it appears that ratepayers have received, since 2007, overearnings of approximately \$130 million.

[84] Consultants for the CA and SBA recommended that the Board continue to direct excess earnings to the FAM to mitigate the impact of rate increases. The Industrial Group and Affordable Energy Coalition supported that position in final argument.

[85] Through the course of the IR process in this proceeding, NS Power refused to commit to refund any overearnings to customers. However, in its Opening Statement filed before the hearing, it agreed to create a fund to accrue excess earnings. NS Power proposed that, during the Fuel Stability Period, NS Power and customers' representatives meet to agree on how to use the funds, including the possibility of using them for non-fuel expenses. If there is no agreement, there would be an application to the Board to determine disposition of those funds. If there is agreement, there would be no Board involvement and funds would be applied without oversight of the Board.

[86] NS Power's witnesses, on questioning from both Intervenors and the Board, struggled to justify why the fund proposal was a superior solution to applying excess earnings to reduce the FAM balance, which had served well for a number of years.

[87] In its Final Submission, the Industrial Group was particularly critical of the proposal:

The Industrial Group submits that NSPI's present commitment is helpful insofar as it states that any Excess Earnings are intended to be used for ratepayers but it is still deficient in a number of material ways.

First, the proposal lacks certainty and clarity. It envisages a multi-step process: negotiation; agreement; absent agreement, a Board application; and if none, by default, application of the Excess Earnings fund to the FAM. (And only if a GRA has not been filed.)

Alternatively, rather than some future negotiation or Board application, by presently directing any Excess Earnings to the FAM, it provides certainty to ratepayers. This benefits all customer classes as there is an existing cost of service model that allocates Excess Earnings to FAM customer classes on a relative share basis. There is no need for negotiation, with different customer classes advancing their own self-interest as to the use to be made of any such monies. One can readily conceive of low income interest groups advocating for their special interests, those who offer demand response advocating for theirs and NSPI looking to dip into the fund, for example, to increase tree trimming or cover storm costs.

All FAM customers are paying the cost of fuel, tracked and allocated monthly and trued up annually. Assigning Excess Earnings to the FAM provides the most direct and transparent means of ensuring that customers have not over-paid in their rates and equitably allocates the amounts back to them.

Secondly, NSPI's commitment is time-limited: until new rates are set in a GRA or the end of 2022, whichever is earlier. The rationale offered was that NSPI believes it is "appropriate" or "better" to have non-fuel items dealt with at the time of the non-fuel hearing when all other nonfuel items are addressed.

If "Excess Earnings" were an input to revenue requirements in the rate-setting process, then NSPI's position may have some merit. However, Excess Earnings are not an input. "Excess" earnings are earnings above the approved range of return at whatever level set by the Board. ... [Emphasis added]

[Exhibit N-28, pp. 8-9]

[88] Each of NS Power, the CA, and particularly the Industrial Group, addressed the issue as to whether the Board had legal authority to order the disposition of excess earnings under the *Public Utilities Act*.

3.7.1 Findings

[89] The Board agrees with the submission of the Industrial Group that the proposed fund by NS Power is a much less desirable solution to the overearnings issue than applying the funds to the FAM. The FAM mechanism is well known and there is no

need for negotiation. All parties clearly understand how it works. Once overearnings are established, they are credited to the FAM balance and dealt with in accordance with NS Power's cost of service – simple and easy to understand.

[90] The proposal by NS Power involves negotiation and agreement – but agreement by whom? Will all customer classes, some of whom do not normally attend hearings, be represented? Then, perhaps, a contested application to the Board?

[91] Having come to the conclusion that the FAM option is preferable, the Board has to decide whether to accept what it sees as NS Power's inferior proposal or, alternatively, consider whether the Board has the legal authority to order overearnings be applied to the FAM.

[92] The Board has determined it is in the public interest to deal with that issue now. Obviously, if any party disagrees, they are free to test that conclusion.

[93] NS Power takes the position based on an earlier Board decision that the Board does not have jurisdiction to determine the disposition of overearnings under the *Public Utilities Act*.

[94] NS Power cited the following passage from *Nova Scotia Power Inc. (Re)*, 2008 NSUARB 140:

The Board's remedy, if NSPI is likely to over earn, is to step in and lower rates. **The Board does not direct the application of excess earnings nor does it allow NSPI to retroactively collect from customers if it fails to earn its allowed rate of return.** The implementation of a FAM will reduce the possibility of over earning as fuel is the largest of NSPI's costs that may vary significantly from forecast. Under the Fuel Adjustment Mechanism, any over earning related to fuel will be adjusted the following year. [Emphasis added in original]

[Exhibit N-14, p. 18]

[95] The Board notes that the issue of the Board's jurisdiction over excess earnings was not directly canvassed in the above proceeding.

[96] The CA, in support of its position, advanced by its expert, that the Board does have the authority to order overearnings, cites a decision of the Prince Edward Island Regulatory and Appeals Commission:

It is also noted that mandating the return of over-earnings to ratepayers is not without regulatory precedent. For instance, in the recent decision of the Prince Edward Island Regulatory and Appeals Commission in Order No. UE19-08 - MECL - Docket No. UE20944 - General Rate Application, the Commission stated at para. 185:

...Instead, any over-earnings earned in 2019, 2020 and/or 2021 shall be determined by the Company as at December 31 of each year, and refunded to ratepayers on a per KWh basis within 60 days of the calendar year-end.

[Exhibit N-27, pp. 2-3]

[97] The Industrial Group cited, as authority for its position that the Board has the jurisdiction to determine disposition of overearnings, a decision of the Newfoundland Court of Appeal, *Newfoundland (Board of Commissioners of Public Utilities), Re, 1998 CarswellNfld 150 (NLCA)*. In that case, the Newfoundland Public Utilities Board stated a case on appeal for determination by the Court of Appeal which involved seven questions. Question 3 is precisely relevant to the issue the Board is considering in this matter:

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

[98] Writing for the majority, Justice Green found that the Public Utilities Board had jurisdiction to set the rate of return as a range, and that it had jurisdiction to regulate how any excess revenue was dealt with in a situation where the utility earned a rate of return greater than that which was previously determined to be just and reasonable.

[99] The Court reviewed relevant provisions of the *Public Utilities Act* in Newfoundland and Labrador, which are, generally speaking, similar to Nova Scotia's *Public Utilities Act*.

[100] Prior to embarking on his analysis of the seven questions, Justice Green set out six general principles to be used in the interpretation and application of the utility legislation he was dealing with. They are as follows:

1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;
3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;
4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;
5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.
6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[101] The principal findings with respect to question 3 include the following:

73 ... It follows, therefore, that the issue of excess earnings may present itself for consideration by the Board in circumstances even where a reserve account has not been ordered to be set up. For the purpose of regulation by the Board, the concept of excess earnings is derived from the process of prescribing a just and reasonable return on rate base and not by the decision to require the creation of a reserve account. The question to be considered is what enforcement mechanisms the Board may use to deal with excess earnings so identified.

74 If, as determined in the answer to Question 1, the Board has jurisdiction flowing from s-s. 80(1) to prescribe the maximum rate of return which a utility may earn in a given year, it is a necessary consequence of such a determination that revenue earned in excess of the maximum of the prescribed range of return is excess revenue to which, by definition, the utility will not be entitled. The Board accordingly must have jurisdiction to regulate how that excess revenue is to be dealt with. [Emphasis added]

[102] The Court went on to say:

80 Those opposing a broad jurisdiction on the part of the Board to define and deal with excess revenue couch the objection, at least in part, in terms of a violation of the non-retroactivity principle. In its narrow sense, it is a principle of benefit to consumers, that "today's rate payers should pay the cost of today's services and not the cost of past or future services". More broadly, it also yields a presumption (which is of benefit to the utility as well), flowing from the idea that the Board acts prospectively in setting rates, that the Board cannot or, even if it has jurisdiction, should not as a general rule, make orders that have the retroactive effect of disturbing existing rights already enjoyed by the utility. In practical terms, it leads to the argument that where rates, tolls and charges have been approved by the Board as being permissible for the utility to charge, the Board cannot or should not make a subsequent order that has the direct or indirect effect of reducing or otherwise changing those rates. In other words, changing past transactions or attaching new consequences to past transactions would be prohibited.

...

85 ... There is no revisiting and revision of a prior order respecting the allowable return on rate base. The examination of actual results in the context of a comparison with the previously prescribed rate merely leads to enforcement of the original order. Any decision by the Board with respect to disposition of excess revenue will therefore not retroactively interfere with past revenues which the utility assumes belong to it and which may be disbursed to shareholders or otherwise spent. Given the concept of excess revenue, as explained in this option, the utility knows in advance that it is not entitled to excess revenue so defined and may institute whatever accounting practices are necessary to segregate and deal with such revenues pending direction from the Board.

...

88 In the situation presently under consideration, however, there is no subsequent order of the Board which retroactively changes previously-approved rates, tolls or charges or revises the prescribed level of return to which the utility is entitled. All that occurs is the subsequent examination of actual results and a determination of whether excess revenue was in fact earned by applying a pre-existing standard derived from a previous Board order made under ss. 80(1).

...

94 ... The power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer. The starting point is the power, found to exist in the answer to Question 1, that the Board may prescribe a rate of return under s-s. 80(1) which carries with it the necessary corollary that the utility is only entitled to earn that level of return, as determined by the Board to be just and reasonable. It follows that unless the Board is to be a "toothless tiger" it must be accorded the means by which revenues earned in excess of the prescribed level of return are used in furtherance of the objectives and policies of the legislation and not simply for the benefit of the utility's investors. ...

95 The means whereby the excess is dealt with should not be, unless expressly limited by the legislation, rigidly prescribed provided the means chosen comport with the objectives and policies of the legislation. It is worth repeating Gonthier, J.'s observation in the *Bell Rebate* case that the fact that the differences between projected and actual rates of return are common calls for "a high level of flexibility in the exercise of the [Board's] regulatory duties".

...

105 The answers to Questions 3 and 4 can be given as follows:

As to: 3(i) - Yes

3(ii) - Yes

3(iii) – Yes [Emphasis added]

[103] The following provisions of our *Public Utilities Act* are relevant to this discussion:

Amount utility entitled to earn annually

45 (1) Every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base as fixed and determined by the Board for each type or kind of service furnished, rendered or supplied by such public utility, provided, however, that where the Board by order requires a public utility to set aside annually any sum for or towards an amortization fund or other special reserve in respect of any service furnished, rendered or supplied, and does not in such order or in a subsequent order authorize such sum or any part thereof to be charged as an operating expense in connection with such service, such sum or part thereof shall be deducted from the amount which otherwise under this Section such public utility would be entitled to earn in respect of such service, and the net earnings from such service shall be reduced accordingly.

(2) Such return shall be in addition to such expenses as the Board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the Board according to this Act and the rules and regulations of the Board.

Approval of schedule of rates and charges of utility

64 (1) No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.

(2) The schedule of rates, tolls and charges so approved shall be filed with the Board and shall be the only lawful rates, tolls and charges of such public utility until altered, reduced or modified as provided in this Act. R.S., c. 380, s. 64.

Interpretation and construction of Act and powers of Board

116 (1) This Act shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Board by the provisions of this Act, the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this Act conferred on the Board.

(2) The Board hereby created shall have, in addition to the powers in this Act specified, mentioned and indicated, all additional, implied and incidental powers which may be proper or necessary to carry out, effect, perform and execute all the said powers herein specified, mentioned and indicated.

(3) A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. R.S., c. 380, s. 116.

[104] The principles of statutory interpretation apply when interpreting the *Public Utilities Act*. In determining the intent of any particular statute, this Board is mindful of *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier*, [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), which make it clear that the Supreme Court of Canada has adopted what it calls the “modern contextual approach” to legislative interpretation, supplanting earlier rules it has supported, such as the “equitable construction approach”, the “plain meaning rule”, and the “golden rule”.

[105] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said:

...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p.87, he states:

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

[106] In a recent judgment, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

[27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that “[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*), [1998] 1 S.C.R. 27 at ¶21).

[28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan’s text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

[29] Ms. Sullivan’s questions have been applied in several cases, including *Keizer v. Slaunwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:

1. What is the meaning of the legislative text?
2. What did the Legislature intend?
3. What are the consequences of adopting a proposed interpretation?

(Sullivan, pp. 9-10)

[107] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

9(1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[108] The basic principles of regulation of public utilities in Nova Scotia were extensively and definitively dealt with by the Court of Appeal in *Board of Commissioners of Public Utilities v. Nova Scotia Power* (1976), 75 D.L.R. (3rd) 72, commonly known as the “*Contracts Case*”.

[109] Nova Scotia Power Corporation had been declared by the Legislature to be a public utility in July of 1976. Previously it had been unregulated. This placed Nova Scotia Power under what the Court determined to be "comprehensive control" of the Board which had the duty to regulate all rates, tolls, charges or schedules of the utility.

[110] The contracts which were dealt with in the *Contracts Case* included five municipal contracts and some dozen or more industrial contracts. The rates under these contracts were set as indirect subsidies at levels below the rates which might have been set had accepted regulatory standards been applied.

[111] The issue which the case squarely raised was, with Nova Scotia Power having become a regulated public utility, did the Board's powers and duties to supervise public utilities and to make orders as to the rates to be charged by them, give the Board jurisdiction over rates previously set under these contracts.

[112] In answering these questions, the Court of Appeal reviewed the powers and duties of the Board in regulating a utility, such as Nova Scotia Power, and stated:

Such industries are peculiarly charged with a public interest. Economic efficiency requires that such an industry be assured of a monopoly in its market, but the consequent lack of competition dictates that the monopoly be controlled in the interest of the consumers.

[*Contracts Case*, p.75]

[113] The general powers of the Board are found in s.18 of the *Public Utilities Act*:

18 The Board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.

[114] In exercising control of the public utility, the two principal objectives of regulation are that all rates must be just, reasonable, sufficient and not discriminatory or preferential and that the service must be adequately, efficiently and reasonably supplied to the public.

[115] The *Contracts Case* did not deal specifically with the issue raised here. However, the Board considers the finding in this Decision and the decision of the Newfoundland Court of Appeal are consistent with the principles outlined in that case.

[116] No other cases were cited by counsel.

[117] While the Newfoundland case has been cited in a number of other cases in support of the broad authority of a public utility regulator, none of them have dealt with the issue of excess earnings. A case which discusses and distinguishes the Newfoundland case is *City of Calgary v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132. In that case, ATCO Gas and Pipeline Ltd. had applied to the Alberta Board to correct balances in a deferred gas account attributable to overstated gas costs for one period and understated gas costs in others. ATCO proposed to pay the shortfalls and that it would refund the excess to customers. The Alberta Board allowed ATCO's application to use a reconciliation process to record the transportation imbalances. In a majority decision of the Court of Appeal, Justice Hunt overturned the Alberta Board's decision on the basis of unreasonableness, but specifically rejected the argument that the Alberta Energy and Utilities Board had engaged in prohibited retroactive ratemaking.

[118] In a concurring decision, Justice Côté agreed with the majority that the Board's decision was unreasonable, but then went on to conclude, in a dissenting opinion, that the Alberta Board had engaged in retroactive ratemaking. Justice Côté referred to the Newfoundland case and briefly discussed the Newfoundland legislation concerning regulation of electric utilities and found that, "that legislation bears no resemblance to Alberta legislation regulating gas activities" (paragraph 229). The discussion of the Newfoundland case is in two relatively short paragraphs of the Alberta Court of Appeal

Decision. It is a dissenting opinion on the issue of retroactive ratemaking, apparently based on legislative differences.

[119] Other than the landmark decisions which set out general principles with respect to rate of return, *Northwest Utilities v. Edmonton* (1929) S.C.R. 186; *Bluefield Waterworks Company v. The Public Service Commission* (1923) 262 U.S. 679; and *Federal Power Commission v. Hope Natural Gas* (1944) 320 U.S. 591; the Board has not canvassed any other cases directly on point.

[120] The Board, clearly, must acknowledge and deal with the quote from the 2008 decision cited by NS Power. The comment was obiter. It was a view held at the time, based largely on American authorities, which base their reasoning on certain principles of eminent domain that are prevalent in the United States.

[121] However, it is trite law to say that previous decisions of the Board are not binding on the Board. There was no serious analysis or legal argument in that 2008 case similar to what has happened here, particularly at the instance of the Industrial Group.

[122] Therefore, having carefully considered the analysis in the Newfoundland case, which is not binding but which is certainly persuasive, the Board has revisited its view on this matter. As noted by counsel for the Industrial Group, the Newfoundland Court of Appeal stated in its decision that unless the Board is to be a "toothless tiger", it is empowered to deal with excess earnings.

[123] The Board finds persuasive and agrees with the two principal findings of the Newfoundland Court of Appeal. First, that in dealing with excess earnings there is really not any violation of the rules against retroactivity. There is only a time lag of a month or two from the fiscal year end to when NS Power has its books examined and determines actual earnings, usually by February or March, at which point the extent of excess

earnings, if any, are known. Here there is no adjustment of just and reasonable rates if overearnings are refunded. Second, the Board also agrees with the Newfoundland Court of Appeal's principal finding that if the Board has the jurisdiction to prescribe the maximum rate of return which the utility can earn in a given year, which is widely accepted by all parties, it is a necessary consequence of such determination that revenue earned in excess of that is revenue to which, by definition, the utility is not entitled. Thus, the Board must have jurisdiction in setting just and reasonable rates to determine how that excess revenue is dealt with.

[124] Applying the *Sparks* judgment of the NSCA, the Board should consider the question – “What are the consequences of adopting NS Power’s interpretation on this issue?” The answer is that NS Power would be able to keep excess earnings above its allowed range of return.

[125] The *Public Utilities Act* gives the Board powers which are to be interpreted and construed liberally in order to accomplish the purpose of the *Act*, including all "additional, implied and incidental powers which may be proper or necessary to carry out, effect, perform and execute all of the said powers herein specified, mentioned and indicated".

[126] The Board has concluded, therefore, that it does have the jurisdiction to determine the disposition of earnings above NS Power's allowed rate of return.

[127] It has also determined that the most effective way to deal with any overearnings during the next Fuel Stability Period is to direct those earnings be applied to the FAM balance.

[128] NS Power argued in connection with the creation of its proposed fund, that should NS Power apply for a general rate case, the agreement on overearnings would be terminated and that issue would be dealt with in the rate case.

[129] The Board orders that annual overearnings during the 2020-2022 Fuel Stability Period be applied to the FAM balance. However, if NS Power files a general rate application during that period it may, as part of that filing, seek an amendment to this Order.

3.8 Bates White recommendations for improvements of future filings

[130] Bates White identified concerns with the ability to test elements of this application for accuracy and resulting rates. The focus of this concern was Appendix F (later revised and refiled as Appendix E in Reply Evidence, Appendix E1 in Revisions to Reply Evidence and Undertaking U-4). During the hearing, NS Power explained Appendix F is intended to demonstrate smoothing. NS Power, however, had explained in its application that Appendix F provides the revenue analysis by rate class and this data forms an input into the calculation of the proposed rates shown in Appendix H. The BCF and AA/BA rates provided in Appendix H and Appendix F were driven by hard-coded inputs versus formulas.

[131] This application introduced numerous complexities in the buildup of BCF and AA/BA balances, as well as in the presentation of proposed smoothing, deferrals and resulting rates. The Board understands NS Power provided a summary of Appendix F in IR-1(c), intended to provide the individual components reconciled to resulting rates. This summary initially indicated the rates, if approved, would result in \$107.7 million in additional non-fuel revenue. In a strictly fuel-related application, this raised concerns.

[132] Appendix F was revised over the course of this proceeding a number of times in an effort to verify the required BCF budget translated into the proposed BCF rates. NS Power has since acknowledged this issue and revised the presentation to report the BCF separate from the AA/BA. The BCF budget now aligns with the BCF revenue reported in its application. This resolves concerns of fuel revenues not tracked appropriately.

[133] While Bates White confirmed NS Power's updated BCF budgets and the Board will ask them to confirm the AA/BA amounts and review the rates in the Compliance Filing, it recommended future filings include detail by component as provided in Appendix E1 as well as the necessary detailed calculations to avoid hard-coding values.

3.8.1 Findings

[134] The BCF is intended to be a straightforward rate, driven by the anticipated cost across the anticipated load by customer class. Similarly, the AA and BA are intended to be straightforward riders assigned to the customer groups to refund prior balances owed to those customers or to collect funds owed to the Utility.

[135] As NS Power nets various balances in the BCF and AA/BA, or applies for multi-year rate smoothing and deferrals, it must ensure both the build-up of the individual elements and the net result remain clear and understandable.

[136] The Board directs NS Power to calculate and provide these elements separately in future applications, and only once the individual elements and rates are developed, should any rate smoothing be introduced. The Board also directs NS Power to ensure the proposed rates are formula driven and tie back to the budget or balance driving the rate for the individual elements.

3.9 The FAM incentive

[137] The FAM incentive is included in the current Plan of Administration as an incentive to NS Power to obtain the best fuel prices. It was removed from the current Rate Stability Period as part of the 2017-2019 Fuel Stability Plan in accordance with Section 8.2 of the *Electricity Plan Implementation (2015) Act*. NS Power noted that the FAM incentive was adopted based on a BCF reset occurring every two years. The incentive did not contemplate multi-year fuel stability periods. NS Power argued the uncertainty of fuel forecasts versus actual cost increases the risk to the fuel forecast and, therefore, it is appropriate to suspend the incentive in the circumstances. It notes this position is consistent with the view expressed by the Board's consultant Liberty Consulting in the 2016 BCF reset (M06962).

3.9.1 Findings

[138] None of the Intervenors in this proceeding have filed any evidence opposing NS Power's proposal to continue the suspension of the FAM incentive. The Board agrees that it is appropriate to continue the suspension of the FAM incentive for the 2020-2022 Fuel Stability Period.

4.0 COMPLIANCE FILING

[139] The Board approves the three-year Fuel Stability Plan, including the FAM customer BCF for each of 2020, 2021 and 2022, together with the application of the AA/BA, and other adjustments directed in this Decision, including rate smoothing.

[140] NS Power is directed to file a Compliance Filing no later than December 13, 2019.

[141] The Formal Intervenors are to provide comments, if any, no later than December 17, 2019, with a rebuttal by NS Power, if required, by December 19, 2019.

[142] An Order will issue following the Compliance Filing.

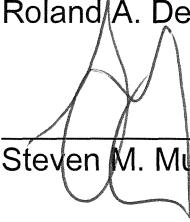
DATED at Halifax, Nova Scotia, this 6th day of December, 2019.



Peter W. Gurnham



Roland A. Deveau



Steven M. Murphy