**DECISION** **2024 NSUARB 209**
**M11858**

**NOVA SCOTIA UTILITY AND REVIEW BOARD**

**IN THE MATTER OF THE PUBLIC UTILITIES ACT**

**- and -**

**IN THE MATTER OF AN APPLICATION** by **BERWICK ELECTRIC COMMISSION**, **THE TOWN OF ANTIGONISH**, and **THE TOWN OF MAHONE BAY** regarding the proposed ownership structure for their solar gardens

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| **BEFORE:** | Stephen T. McGrath, K.C., Chair<br>Roland A. Deveau, K.C, Vice Chair<br>Richard J. Melanson, LL.B., Member |
| **APPLICANTS:** | **BERWICK ELECTRIC COMMISSION**<br>**THE TOWN OF ANTIGONISH**<br>**THE TOWN OF MAHONE BAY**<br>James A. MacDuff |
| **INTERESTED PARTIES:** | **CONSUMER ADVOCATE**<br>David J. Roberts, Counsel<br><br>**SMALL BUSINESS ADVOCATE**<br>Melissa P. MacAdam, Counsel<br><br>**BARRY DUPUIS** |
| **BOARD COUNSEL:** | William L. Mahody, K.C. |
| **FINAL SUBMISSIONS:** | October 29, 2024 |
| **DECISION DATE:** | **December 18, 2024** |
| **DECISION:** | **Approval for solar gardens required under s. 35 of the *Public Utilities Act*.** |

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## 1.0 SUMMARY

[1] The Berwick Electric Commission (BEC), the Town of Antigonish and the Town of Mahone Bay asked the Board to confirm that a solar garden owned by the Town of Berwick and operated under a power purchase agreement between the Town of Berwick and the BEC would not be providing a public utility service and would therefore not be regulated under the *Public Utilities Act*, R.S.N.S. 1989, c. 380 (*PUA*). This would include any requirement for Board approval of the construction of the solar garden under s. 35. The Town of Mahone Bay and the Town of Antigonish, who have also developed solar gardens, are contemplating establishing similar electric commissions for their municipal electric utilities and are thus interested in the Board's determination of this question.

[2] To determine whether approval is needed under s. 35 of the *PUA*, the Board had to decide whether the solar gardens are used to produce and transmit electric power either directly or indirectly to or for the public. The Board applied a common law test developed over many years to determine what is meant by "directly or indirectly to the public" and considered the term in the context of the legislative scheme and its purpose. While there are numerous factors to consider, the focus of the analysis is whether the solar gardens have been dedicated to public use in the sense that they are meant to supply power to all retail customers in the owner's franchise area.

[3] The electric utilities of the Towns of Mahone Bay and Antigonish are not separate legal entities. The assets used to provide electric service are owned and operated by those towns. Even treating the utilities and their host municipalities as separate entities for regulatory purposes does not change the fact the solar gardens are used to supply electricity to the towns' customers. While there may be municipal functions

that incidentally touch on utility functions which would not be subject to Board oversight under the *PUA*, supplying electricity to all its retail customers under a duty to serve, in a defined service territory, is a core electric utility function. Therefore, under the current legal structure, the capital costs of the Towns of Antigonish and Mahone Bay solar gardens clearly require Board approval under s. 35 of the PUA.

[4] The BEC is a separate legal entity authorized to operate a utility within the Town of Berwick. All the assets the BEC uses to supply electrical power to its customers are owned by the Town of Berwick. The solar garden is no different and will also be used to supply electricity to BEC's customers. As discussed in more detail later, there is no reason in principle why the solar garden should be treated differently under the *PUA* than the other Town of Berwick assets used for this same purpose. Board approval is required for the capital costs of the Town of Berwick's solar garden.

[5] During this proceeding, a collateral issue arose about whether the Alternative Energy Resource Authority (AREA) was a public utility. AREA is in a fundamentally different position than the municipal electric utilities. It was established to provide wholesale market services to municipal utilities in competition with NS. Power. AREA does not have an obligation to serve retail customers in a franchise area. It, therefore, has a limited number of customers who are all regulated utilities. The Board has determined AREA is not a public utility.

[6] The municipal electric utilities must apply to the Board for approval of the capital costs of the solar gardens. The Board directs that these applications be filed on or before June 1, 2025.

## 2.0 BACKGROUND

### 2.1 Overview of key facts

[7] Small municipal electric utilities operate in the Town of Antigonish, the Town of Berwick and the Town of Mahone Bay (MEUs). The MEUs buy most of the electricity they supply to their customers from other parties, such as Nova Scotia Power Incorporated. They also buy energy from AREA, an intermunicipal corporation the towns own, which operates a wind farm in Ellershouse, Nova Scotia.

[8] The assets used to provide electric service in the Town of Antigonish and the Town of Mahone Bay are owned and operated by the towns in the same way that they, and dozens of other municipalities throughout the province operate water utilities. The utility that serves the Town of Berwick is operated by the BEC, which operates as a management board appointed by the Town Council under the *Berwick Electric Commission Act*, S.N.S. 1977, c. 84. While this legislation vests the BEC with the authority to generate, transmit, distribute and sell electricity, the Town of Berwick owns all utility assets:

> **9** All the powers vested in the Council under the provisions of Chapter 69 of the Acts of 1924 respecting generation, transmission, distribution and sale of electric energy and power are hereby vested in the Board, except the following rights and powers, which shall remain in the Town, namely:
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> (a) the ownership of the buildings, machinery, plant, real estate and other property now owned by the Town or which may be hereafter acquired under the provisions of the said Act, which shall remain the property of the Town;
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> (b) the right to expropriate lands under the provisions of the Towns Act, which shall remain in the Town; and
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> (c) the right to borrow money under the provisions of the Towns Act, which shall remain in the Town.

[9] The Town of Antigonish, the Town of Berwick and the Town of Mahone Bay have recently developed solar gardens, facilitated by funding through the Government of

Canada's Investing in Canada Infrastructure Program (Green Infrastructure, Climate Change Mitigation). The towns jointly applied to that program. AREA supported the endeavor by leading the analysis of the solar garden projects and overseeing a common request for proposal procurement process on behalf of the towns.

[10] In a letter to the MEUs dated February 2, 2024, the Board noted that it had not received any application for the development of these solar gardens under s. 35 of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 (*PUA*), which states:

> **35** No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[11] The Board asked the MEUs to provide information about the ownership structure of the solar gardens, the application of s. 35 of the *PUA* to those facilities, and the inclusion of solar garden costs in recent rate applications by the MEUs.

[12] In their response letter dated March 1, 2024, the MEUs noted that final decisions about the ownership structure for the solar gardens had not been made. They also provided some comments on the application of s. 35 in certain situations and confirmed that solar garden costs had not been included in recent rate applications.

[13] In a letter dated August 21, 2024, the MEUs advised the Board that the Town of Berwick intends to own the solar garden in that town and sell electricity from that facility to the BEC under a power purchase agreement (PPA). They submitted that given the distinct corporate identities of the Commission and the Town, no application under s. 35 of the *PUA* was required by the Town. The MEUs asked the Board to confirm this was the case and, assuming this was confirmed by the Board, noted that the Town of Mahone Bay and the Town of Antigonish were considering the development of similar legislation

to establish separate electric commissions for their utilities in the same manner as was done in Berwick.

[14] The Board invited submissions on the MEUs' request and received comments from the Consumer Advocate, the Small Business Advocate and Barry Dupuis. Mr. Dupuis is a resident of the Town of Mahone Bay who has expressed concerns about the development of the solar garden there without appropriate regulatory oversight. The MEUs provided responses to these comments with further submissions. The MEUs also provided additional comments in response to a request from the Board for further information about the legislation that created the BEC and the division of authority and assets between the Commission and the Town of Berwick.

### 2.2 Review of general legal principles

[15] The MEU's request (i.e., that the Board confirm that s. 35 of the *PUA* will not apply if the Town of Berwick owns the solar garden assets and sells the electricity to BEC under a power purchase agreement) invites the Board to consider whether, in acting as described, the Town of Berwick would be a public utility subject to regulation by the Board under the *PUA*. That statute defines a "public utility" as:

> (e) "public utility" includes any person that may now or hereafter own, operate, manage or control
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> (i) any tramway,
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> (ii) any trolley bus or motor vehicle, other than one being operated as a taxi, for the conveyance of passengers from any point within a city or incorporated town to any other point within such city or town, including any such person who also operates any trolley bus or motor vehicle for the conveyance of passengers to or between points outside such city or town but not including any such person whose revenue from the operation of any trolley bus or motor vehicle for the conveyance of passengers between points within any city or town does not, in the opinion of the Board, exceed ten per cent of the gross revenue of such person from the operation of trolley buses or motor vehicles,
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> (iii) any plant or equipment for the conveyance of telephone messages,

> (iv) any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy or steam heat either directly or indirectly to or for the public,
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> (v) any plant or equipment for the production, transmission, delivery or furnishing of water either directly or indirectly to or for the public,
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> (vi) any plant or equipment for the extraction, transmission, delivery or furnishing of a geothermal resource or for the production, transmission, delivery or furnishing of geothermal energy or heat either directly or indirectly to or for the public;
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> (f) "service" includes
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> ...
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> (vii) (iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power, [Emphasis added]

[16] The Board's most recent comprehensive consideration of this definition was in its decision about an ambient temperature district energy system in *Halifax Regional Water Commission (Re),* 2020 NSUARB 70 (*ATDES* decision), where the Board considered whether Halifax Water's operation of its proposed ambient temperature district energy system would be a public utility service regulated under the *PUA*. The two main areas of contention in that case were whether the proposed service would be a public utility service and whether that service would be provided "directly or indirectly to or for the public".

[17] In its decision in that case, the Board referred to several factors that could be considered in determining whether a service is being provided "to or for the public". These included:

- The number of customers;
- Whether the service was available to anyone seeking it;
- Whether the service was being offered to a closed class or special class of persons;
- Whether the service was being offered in a defined or limited geographic scope;

- Whether the service was available to the public generally and indiscriminately or if access to the service was controlled; and
- Whether the service was contrary to the public interest requiring public regulatory oversight.

[18] The Board also referred to two leading American decisions on this issue:

> ...A leading U.S. case not cited by HRM is *Re Camden Cogen, L.P.*, 158 P.U.R. 4th 637 (1995), a decision of the New Jersey Board of Public Utilities Commission.
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> The following test was set out by the Commission:
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> > A determination as to whether an entity is operating for the public use depends on the facts of each case. The underlying consideration is whether the character and extent of a particular operation affects the public at large in a way which requires submittal to public regulation for the common good. See, Munn v. Illinois. 94 U.S. 113. 24 L.ed. 77 91876); Lewandowski v. Brookwood Musconetcona River. Ass'n., 37 N.J. 433 (1962); Petition of South Jersey Gas, supra. The principle guiding factors which we apply in this regard are:
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> > 1. whether the facilities are located in public streets;
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> > 2. whether the company provides meters and/or charges separately for its service;
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> > 3. whether the company is holding itself out to serve the general public;
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> > 4. whether there is an economic impact on the regulated market;
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> > 5. whether there is a potential for expansion; and
> >
> > 6. whether a significant number of retail customers are being served.
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> In *Arizona Water Company v. Arizona Corporation Commission*, 107 P.U.R. 4th 439, (1989), the Arizona Court of Appeals used the following criteria to determine whether an entity is a public service corporation:
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> > 1. What the corporation actually does;
> >
> > 2. Articles of incorporation, authorization, and purposes;
> >
> > 3. A dedication to public use;
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> > 4. Dealing with the service of a commodity in which the public has been generally held to have an interest;
> >
> > 5. Monopolizing or intending to monopolize the territory with a public service commodity;
> >
> > 6. Acceptance of substantially all requests for service;

7. Actual or potential competition with other corporations whose business is clothed with public interest;

8. Service under contracts and reserving the right to discriminate.

[19] The Board emphasized that the assessment was contextual and noted that not every factor would be significant or carry the same weight in every situation.

## 3.0 DISCUSSION

[20] The Board will now address the key issue of whether the capital costs of solar gardens owned by the Towns of Antigonish, Mahone Bay, and Berwick require Board approval under s. 35 of the *PUA*. This will require an analysis of whether the solar gardens are used for the production, transmission, delivery or furnishing of electric power or energy either directly or indirectly to or for the public. The Board will also address a collateral issue raised during the proceedings about whether AREA is a public utility.

### 3.1 The Town of Antigonish and the Town of Mahone Bay are public utilities and require approval under s. 35 of the *Public Utilities Act* for the solar gardens.

[21] Unlike the Town of Berwick, the Towns of Antigonish and Mahone Bay do not have separately incorporated electric utilities. Each town has constructed its solar garden. The solar gardens are owned by the towns. The capital costs and operating expenses of the solar gardens have not yet been included in MEU rates, whether it be in a general rate application or through flow-through applications. The towns are essentially awaiting the Board's ruling on whether the Town of Berwick's proposed solar garden ownership and power purchase agreement structure with the BEC requires approval under s. 35 of the *PUA*.

[22] The Towns of Antigonish and Mahone Bay each have an electric utility that is not a separate legal entity from the respective towns. This is essentially an accounting and operational structure as opposed to a legal structure. This is like most municipal water utilities in the province. In *East Hants (Municipality) v. Nova Scotia (Utility and Review Board)*, 2020 NSCA 41, the Nova Scotia Court of Appeal commented on the regulatory approach and treatment of water utilities that are not separate legal persons from the hosting municipality.

[23] In *East Hants*, at paras. 43 to 45, the Nova Scotia Court of Appeal appeared to approve of a Board precedent that discussed this issue:

> [43] In *County of Antigonish (Municipality) (Re)*, 2007 NSUARB 138, the Board considered the issue of a municipality "wearing two hats"—as both the municipality and the owner of the water (public) utility. The Board said a municipality and its water utility must be treated as separate legal entities. The Board explained:
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> > [7] Factors that may relate to the issue of whether there are separate legal entities in a technical legal perspective under other aspects of the common law are not determinative of the proper interpretation to be given to the *PUA*.
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> > [...]
> >
> > [25] In reading the *PUA* as a whole and giving it a broad and liberal interpretation, the Board finds the *PUA* directs the Board to regulate the services of a water utility and to set just, fair and undiscriminatory rates which the utility must collect. For the purposes of the administration of the water utility, the *PUA* requires the Board to separate the water utility from its municipal owner in all respects, including all assets, services and expenses that are utilized to provide the water utility services. The assets of the Municipality that are not used for the purposes of the water utility are not permitted to be included in its rate base nor are general expenses not related to the water utility's services permitted to be included either. Conversely debts that are not related to the operation of the water utility cannot be deducted or offset from its revenue or its rates. [Emphasis added in original]
>
> ...
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> [45] It appears the Board conflated the Municipality's subdivision functions with its separate functions as a water utility. As the Board has said in *County of Antigonish (Municipality) (Re)*, the two hats worn by the Municipality are, in fact, distinct.

[24] The Board notes that neither *East Hants* nor *County of Antigonish* address the situation presently before it. The Court clearly found on a factual basis that in *East Hants*, the municipality was only undertaking its subdivision planning functions and not its water utility functions. There were separate and distinct Board review jurisdictions, depending on which function the municipality was exercising. In *County of Antigonish* the issue related to whether a non-utility debt could be set off against utility charges. The current case involves the generation and sale of electricity where the same legal entity is doing both.

[25] Subsections 303(2)(d), (e), and (h) of the *Municipal Government Act* (*MGA)* allow a municipality to sell electricity to a person or body; sell electric power to a person, firm or corporation having authority to supply electricity in the municipality; and construct electric power generation facilities. It does not follow that these activities fall outside the purview of the definition of a public utility under the *PUA*. In this case, if the Towns of Antigonish and Mahone Bay sell electric power from the solar gardens to retail customers under s. 303(2)(d) of the *MGA*, they are clearly undertaking a core utility function under the *PUA*. This can only be done through their respective utilities, even where the Towns and their utilities are treated as separate entities for regulatory purposes (see *East Hants*, paras. 43-45).

[26] There is currently no separate person, firm or corporation having authority within either municipality to supply electric power. The Board finds that the treatment of the Towns and their electric utilities as separate entities for regulatory purposes does not extend to having the Towns of Antigonish and Mahone Bay contract with themselves for the sale of electricity. The supply of electric power from a solar garden to a utility, for the

benefit of its ratepayers, is a core utility function. In effect, the solar garden assets are dedicated to public use. Therefore, the Towns of Antigonish and Mahone Bay cannot currently use s. 303(2)(e) of the *MGA* as a potential argument that the circumstances are like AREA selling power to a limited number of customers. Accordingly, even though the Towns of Antigonish and Mahone Bay have the power to construct generating assets under the *MGA*, the solar garden capital project under the current ownership structure must be approved by the Board.

[27] The Towns of Antigonish and Mahone Bay do not appear to contest the need for Board approval under the current ownership structure. However, they say that since the solar garden assets are currently not in rate base, and operating expenses for the solar gardens are not included in rates, any capital approval application could be deferred until a utility structure like the BEC is established. The Towns of Antigonish and Mahone Bay say this situation is like several instances where NS Power has undertaken projects at shareholder risk until Board approval is obtained.

[28] There have been instances where the Board has allowed NS Power to proceed with capital projects, at shareholder risk, prior to obtaining the required approval under the *PUA*. These usually involve situations where the projects must be completed quickly to avoid potential power disruption issues. NS Power seeks approval in advance outlining why the project must be done prior to Board approval. While the Board was made aware of the existence of the solar gardens, no such request was made prior to this process being initiated by the Board. In any event, given the Board's determination about the solar garden projects still needing approval under s. 35 of the *PUA* under the BEC

structure, as discussed later in this decision, it is now time for the MEUs to bring these projects before the Board.

### 3.2 The Alternative Energy Resource Authority is not a public utility.

[29] The initial scope of this proceeding was about municipal solar gardens. AREA became a part of the discussion because of some uncertainty surrounding the ultimate ownership of the solar gardens. The MEUs raised the possibility that the solar gardens could be owned by AREA, who would enter contractual arrangements with the MEUs. The MEUs drew an analogy to an existing arrangement between the MEUs and AREA to obtain power from the Ellershouse Wind Farm.

[30] AREA was established in 2014. It is owned by the Towns of Antigonish, Berwick, and Mahone Bay. AREA owns the Ellershouse Wind Farm. It supplies electricity to the MEUs, as well as to the Riverport Electric Light Commission. AREA has also arranged power purchases for the MEUs over the New Brunswick transmission intertie. The MEUs said that AREA is not a public utility when supplying electrical energy to municipal electric utilities and would be in the same position if it supplied solar energy to the Antigonish, Berwick and Mahone Bay MEUs.

[31] Mr. Dupuis submitted that AREA should be considered a public utility and regulated as such by the Board. He compared AREA to NS Power which also sells electricity to the MEUs. Mr. Dupuis submitted AREA is not an independent power producer under the *Electricity Act* because it is majority owned by public utilities. Finally, and perhaps the crux of his argument, Mr. Dupuis submitted that AREA is selling electricity "indirectly" to the public and therefore must be regulated as a public utility.

[32] There is no dispute that AREA generates and supplies a commodity, namely electrical energy, that is potentially subject to regulation under the *PUA*. The key question is whether AREA supplies this electrical energy "directly or indirectly to or for the public" as required by s.2(e)(iv) of the *PUA* to make AREA a regulated public utility. The MEUs say that AREA is not a public utility, as that term has been defined in the case law and by this Board, because AREA has no service territory, no retail customers, no duty to serve, is not monopolistic and sells electrical energy exclusively to four MEUs.

[33] The CA did not take any position on whether AREA was a public utility. The CA discussed how the term "public utility" is defined in the *PUA*. He referred the Board to its decision in *ATDES*, where, when considering the status of a proposed Ambient Temperature District Energy System, the Board listed a variety of factors that could be considered when determining whether an entity is a public utility. The SBA did not take a position on this issue.

[34] Determining the meaning of the phrase "directly or indirectly to or for the public" is an exercise in statutory interpretation. In *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, at p.742, the Supreme Court of Canada re-affirmed the "modern principle" of statutory interpretation:

> that the words of a statute must 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 para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[35] In *Vavilov*, at p. 743, the Supreme Court of Canada made specific reference to the statutory interpretation exercise expected of administrative tribunals such as the Board:

> Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. [Emphasis added]

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

[37] The *Electricity Act*, passed in 2004 and proclaimed on February 1, 2007, provides important information for the Board's analysis. The *Electricity Act* permitted wholesale customers to purchase electricity from any competitive supplier. The MEUs are included in the definition of wholesale customers under the *Electricity Act*. Prior to the proclamation of the *Electricity Act*, the MEUs could only purchase electricity from NS Power at a Municipal Rate established for this purpose.

[38] In other decisions, the Board has considered whether various entities were public utilities. The *ATDES* decision is the latest one. As discussed in the *ATDES* decision, when deciding "…whether the provision of a particular service creates a public utility, context is key, and not every factor … is significant or carries the same weight in every fact situation." The 2004 amendments to the *Electricity Act* were intended to create some competition by opening the wholesale electricity market to participants other than NS Power.

[39] After the proclamation of the *Electricity Act*, the Province also introduced, through various regulations, a series of initiatives for NS Power to purchase renewable low-carbon electricity from third-party sources. The initiatives included:

- feed-in tariffs for various classes of renewable energy, such as biomass, wind, solar, tidal and run-of-the-river hydroelectricity;
- a net-metering program allowing customers to self-generate electricity from renewable sources and receive credits from NS Power to offset their utility bills;
- a renewable-to-retail program allowing generators of low-carbon energy to sell directly to retail customers in competition with public utilities;
- a community solar program allowing certain qualifying entities to offer subscriptions to retail customers and who would receive credits from NS Power to help offset the cost of purchasing this form of green power; and
- a Green Choice Program allowing corporate or commercial customers to subscribe to green energy.

[40] The feed-in tariff programs generally involve the Board setting a tariff. The regulations establish a procurement process. Other programs involve a procurement process and are subject to Board-approved standard form power purchase agreements. For these programs, while approving the form of the power purchase agreements, the Board does not set the price NS Power must pay for electrical energy. The net-metering program and renewable to retail programs are subject to their own regulatory regimes prescribed by regulation. None of the energy providers under these programs are regulated as public utilities.

[41] While AREA is not part of these specific programs, it was formed to provide an alternative source of energy (other than NS Power) to MEUs in response to the legislative scheme in the *Electricity Act* applicable to wholesalers and wholesale customers. As part of the legislative scheme, the Board had to establish an Open Access Transmission Tariff to provide equal access to independent generators seeking to supply wholesale customers in competition with NS Power. The regulatory scheme for the wholesale market also required a special tariff, known as the Back-up, Top-Up Tariff, to

ensure wholesale customers, such as the MEUs, buying power from independent generators, could continue to rely on NS Power as a source of electricity. Also, the Board approved a NS Power Spill Tariff for use by independent non-dispatchable electric generators such as AREA that supply wholesale customers, such as the MEUs, taking service under the Back-up, Top-up Tariff. AREA is the only entity that supplies electrical energy to NS Power under the Spill Tariff.

[42] The foregoing forms the general background or lens through which AREA's status should be examined. In the Board's opinion, when deciding whether AREA is a public utility under the *PUA*, the key factors to consider are: whether AREA has dedicated its assets to public use; whether it operates a monopoly within a defined geographic area; the impact its operation has on the regulated market; the number and type of customers it serves; and, whether the public interest requires that AREA be subject to the type of regulatory oversight reserved for public utilities.

[43] As discussed in the *ATDES* decision, the dedication of assets to public use is addressed in a few different ways. The Board must consider whether AREA accepts substantially all requests for service; whether AREA holds itself out to serve the general public; whether AREA can single out who can receive its service; and, whether AREA's service is being offered to a closed or special class. Essentially, the foregoing descriptions of this factor can be summarized as whether AREA's product is available to the public generally and indiscriminately. Expressed this way, AREA clearly only offers its product to four MEUs and to NS Power under the Spill Tariff. It has no retail customers at all. The general public does not contract with AREA to obtain service. This factor weighs against a finding that AREA is a public utility.

[44] The second significant factor the Board will address is whether AREA exercises a monopoly over a defined territory. AREA has no franchise or monopoly to provide service over any defined territory. It has no duty to serve any customers. Its arrangement with the MEUs is purely contractual. AREA's sale of electricity to NS Power is governed by the Spill Tariff. AREA must subscribe to the Spill Tariff on an annual basis and has no obligation to do so. The MEUs can and do obtain services from other electrical energy providers, including NS Power. This factor also weighs against a finding that AREA is a public utility.

[45] A third important factor is the impact AREA has on the regulated market. The MEUs form a very small part of NS Power's load. Also, any negative impact AREA has on NS Power's market share of the electricity sold in Nova Scotia is consistent with the goal in the *Electricity Act* of allowing more competition at the wholesale level.

[46] While the case law is clear that the number of customers an entity serves does not necessarily determine whether it is a public utility, it is an important consideration. While AREA only has four direct contractual customers, these four MEUs have approximately 6,151 metered retail customers and 1,196 unmetered streetlight and other small services customers. This figure is based on the most recent general rate applications filed by these MEUs. When AREA subscribes to the Spill Tariff with NS Power, the electricity it sells could help supply that public utility's customers. NS Power serves approximately 95% of the electricity customers in the province. All these customers could theoretically be classified as indirect customers. The Board recognizes that in the *ATDES* decision, the number of retail customers that would indirectly receive thermal energy from Halifax Water's direct customers was significant. The Board found

this was an important factor in its determination that Halifax Water was acting in its capacity as a public utility when providing the ATDES service.

[47] The *ATDES* decision can be distinguished from this case. In this matter, the MEUs, and NS Power, who receive electricity from AREA are all regulated utilities. Their rates are set by the Board in accordance with public utility principles. This includes that energy supply contracts must not be imprudent. Only expenses allowed by the Board go into rates. On the other hand, the *ATDES* decision was about Halifax Water proposing to supply thermal energy through the intermediary of unregulated landlords. If Halifax Water was not a public utility when supplying thermal energy from a monopoly source, there would be no rate regulation at all for a service that the Board found fell within the purview of the *PUA*. Therefore, because they are regulated public utilities, the fact the MEUs and NS Power resell their electrical energy to a significant number of retail customers is not enough, when weighed in the balance with all the other factors, in the Board's opinion, to make AREA, a public utility as the term is defined in the *PUA*.

[48] The foregoing discussion leads the Board to consider overarching considerations about whether it is in the public interest that AREA's service be regulated as a public utility. Theoretically, all suppliers of renewable energy under *Electricity Act* programs could be described as selling electricity indirectly to the public when they supply such energy to NS Power. That electricity ultimately ends up being consumed by NS Power's retail customers who are far more numerous than those of MEUs. Taken to its extreme, this could theoretically include individual customers who generate electricity with rooftop solar panels where excess energy is sold into the NS Power grid.

[49] The foregoing has not been the scheme of regulation envisaged and established by the *Electricity Act* and its regulations. The programs under the *Electricity Act* have different regulatory processes involving different levels of Board regulatory oversight. Neither the Legislature nor Cabinet deemed it necessary to specifically exempt any of these suppliers from being public utilities under the *PUA*, except for renewable to retail suppliers. The Board notes that even though specifically exempt from being public utilities, suppliers who provide renewable energy directly to retail customers must be licensed by the Board and the form of their agreements with small-volume customers must be Board-approved.

[50] The overarching scheme of the *Electricity Act* is clear. Suppliers of renewable low-impact electric energy to public utilities are not subject to the same degree of regulatory oversight as the public utilities themselves. This includes suppliers who compete with NS Power in the wholesale market. The Board will not interpret the meaning of "indirectly" in a strict and formalistic manner. Rather, the legislative text "directly or indirectly to or for the public" must be interpreted within the context of the entire legislative scheme, in the historical context of how that term has been previously defined, always keeping in mind the purposes the *PUA* and the *Electricity Act* seek to achieve.

[51] In the final analysis, when weighing all the factors that tribunals usually consider when deciding whether a particular enterprise is a public utility, the Board finds that AREA is not a public utility, and it would not be in the public interest to find otherwise.

### 3.3 The Town of Berwick is a public utility and requires approval under s. 35 of the *Public Utilities Act* for the solar garden.

[52] In its counsel's letter dated August 21, 2024, the BEC specifically asked the Board to confirm that the solar garden constructed and owned by the Town of Berwick

does not require Board approval under s. 35 of the *Public Utilities Act*, assuming the electric power is sold to the BEC under a power purchase agreement.

[53] A different factual context applies to the BEC than those described earlier in this decision. Unlike the utilities operated by the Towns of Antigonish and Mahone Bay, which have no separate legal status from the towns themselves, the BEC is constituted as a distinct body corporate under the *Berwick Electric Commission Act*, S.N.S. 1977, c.84. In his letter dated March 1, 2024, James MacDuff, counsel for the MEUs, submitted that the Town of Berwick is not an electric public utility. Thus, in his submission, if the Town of Berwick owns its solar garden and sells the electricity to the BEC under a PPA, s. 35 of the *PUA* does not apply. He said this would be consistent with the regulatory treatment applied to AREA's Ellershouse Wind Farm that provides its energy to the towns under a PPA:

> AREA is not a public utility. If AREA owns the solar gardens and sells the electricity to BEC, TOA, and/or TOMB pursuant to a PPA arrangement, then section 35 of the PUA does not apply. This would be consistent with the regulatory treatment of electricity from the Ellershouse Wind Farm, in which the costs associated with that PPA were not subject to pre-approval under section 35 of the *Public Utilities Act*, but were reviewed as test year purchased power expenses as part of the recent General Rate Application process for each of BEC, TOA, and TOMB.
>
> [MEUs Letter, March 1, 2024, p. 2]

[54] As noted earlier in this decision, s. 9 of the *Berwick Electric Commission Act*, enacted in 1977, provides:

> **9** All the powers vested in the [Town] Council under the provisions of Chapter 69 of the Acts of 1924 respecting generation, transmission, distribution and sale of electric energy and power are hereby vested in the [BEC]…

[55] Notwithstanding the above, s. 9 goes on to specifically exempt the ownership of all utility assets, which remain with the Town. This appears to apply to both assets existing in 1977 and those subsequently acquired. There were no submissions to the contrary.

[56] Prior to the 1924 enactment, all the powers for the provision of electricity to Berwick's inhabitants were vested in "The Light and Water Commissioners for the Town of Berwick", a body corporate, which had the following powers:

> 17 (1) The commissioners…are hereby empowered to acquire by purchase or otherwise, or to construct, equip, operate and maintain a system of electric lighting in the town, and in order to obtain such lighting system and equipment, they are hereby authorized and empowered to enter into a contract or contracts for such purposes, by tender or otherwise, to construct works, to acquire lands and generally to do all things necessary to be done in the premises;… [Chapter 131 of the Acts of 1913]

[57] The 1913 enactment establishing the new utility specifically defined the boundaries of the Town of Berwick as the territory over which the commissioners could exercise their powers.

[58] Interestingly, on the same date in 1913, the *Public Utilities Act* was passed, creating the Board of Commissioners of Public Utilities, the Nova Scotia Utility and Review Board's predecessor. It was assigned the general supervision of all public utilities in the province, including "any city, incorporated town or municipality that now or hereafter owns or may own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, and … to or for any other city, incorporated town or municipality."

[59] In a letter dated October 24, 2024, the Board asked three questions to the MEUs:

> 1. If Council's power respecting the generation and sale of electric energy and power was vested in the Berwick Electric Commission in 1977, what is the basis for the Town's authority to operate generation assets outside of the Berwick Electric Commission and sell energy from those assets to the Berwick Electric Commission?
>
> 2. Please confirm that all assets used by the Berwick Electric Commission to provide service are owned by the Town of Berwick or explain otherwise.
>
> 3. If the many applications that the Berwick Electric Commission has made to the Board over the years under s. s. 35 of the *Public Utilities Act* (most recently in Matter

> M11550) have been in respect of assets owned by the Town of Berwick, what is the justification for treating the solar assets differently?
>
> [Board Letter, October 24, 2024, p. 1]

[60] Counsel for the MEUs responded on October 29, 2024. He noted that after the enactment of the *Berwick Electric Commission Act*, the following provisions were included in the *MGA*:

> **303 (2)** A municipality that has entered into a contract for electric power or that generates electric power may
>
> (a) use the electric power for the purpose of lighting streets, highways and property of the municipality or for any other purpose of the municipality;
>
> (b) distribute the electric power throughout the municipality;
>
> (c) establish and maintain an electrical distribution system in the municipality;
>
> (d) sell or dispose of the electric power, or any part thereof, to a person or body;
>
> (e) dispose of the whole of the electric power or any portion that it does not require, or otherwise dispose of, to any person, firm or corporation having authority within the municipality to supply electric power or to operate an electric tramway;
>
> (f) employ required employees;
>
> (g) contract for the supply and distribution of electric power in another municipality, if the council of the other municipality agrees;
>
> (h) acquire real and personal property and construct and operate facilities for the generation, transmission and distribution of electric power;
>
> (i) include in its yearly estimates all amounts that are necessary or proper for the due carrying out of the purposes referred to in this subsection. [Emphasis added]

[61] In response to the first question asked by the Board, Mr. MacDuff asserted that s. 302(2) provides the Town with a "separate authority", i.e., separate from the BEC's authority, to construct and operate facilities for the generation, transmission and distribution of electric power and, indeed, authority to sell or dispose of the electric power to any person or body having authority within the town to supply such electric power, including to the BEC. The Board agrees with this assertion, but that is not the issue in this matter. The issue to be considered by the Board is whether approval under s. 35 is

required to construct such facilities when such power is ultimately destined for, and sold to, the BEC's customers, who are the beneficiaries of a duty to be served by the utility, as discussed later.

[62] In response to the Board's second question, Mr. MacDuff confirmed that all assets used by the BEC to provide service are owned by the Town of Berwick. However, he noted that the capital assets related to the solar garden are distinguished in the Town's Consolidated Financial Statements from the assets related to the provision of service by the BEC. The solar garden assets are identified as "General Capital" in the Consolidated Financial Statements, rather than as "Electric Capital" used for assets related to the BEC. While Berwick submits this demonstrates its intent in relation to the solar garden assets, the Board does not consider this accounting treatment as determinative of whether Board approval is required under s. 35 of the *Public Utilities Act*.

[63] On the Board's third question, the Town identified two major reasons why the solar garden assets should be treated differently than all other applications of the BEC for Board approval under s. 35, despite the assets in both instances being owned by the Town. First, the Town said it collaborated with other municipal electric utilities for the solar garden assets in terms of project development, funding applications, and procurement. The Towns of Berwick (not the BEC), Antigonish and Mahone Bay jointly applied to the Government of Canada for green infrastructure funding. The funding effort was coordinated by AREA, who also took the lead in conducting the analysis of the solar garden projects and oversaw a common Request for Proposal procurement process on behalf of all three towns.

[64] Second, Berwick said the different treatment was justified because of the magnitude of the solar garden expenditures as compared to "normal course" BEC capital requirements. It noted the net book value of the solar garden is about $10 million, which is more than double the net book value of all BEC's "Electric Capital" assets of $4.3 million combined. Mr. MacDuff added that there were financing implications involved as well:

> … One of the issues involved in obtaining financing for the solar gardens (and the Ellershouse Wind Farm before it) was the level of debt relative to the Town of Berwick's debt to service ratio. In the case of the Ellershouse project, the fact that there was a legally enforceable PPA with a revenue stream to cover expenses associated with the assets helped ensure that the debt incurred would not negatively impact the debt to service ratio from the perspective of the Province. The Town of Berwick contemplated the use of a PPA structure for the solar garden assets for similar reasons, rather than through construction and operation by BEC and recovery through BEC's rate base. This is reflective of the fact that ultimately the Town, not BEC, would ultimately be responsible for providing guarantees with respect to any indebtedness incurred in relation to the solar garden assets.
>
> [MEUs Letter, October 29, 2024, p. 3]

**Findings**

[65] To determine whether the construction of Berwick's solar garden is subject to the Board's oversight under the *PUA*, the Board refers again to the test in the *ATDES* decision outlined earlier. The Board must consider whether the proposed service (i.e., producing electricity from the solar garden and selling it to the BEC) is a public utility service and whether that service is provided "directly or indirectly to or for the public".

[66] The electric power produced by the solar garden is destined solely for the BEC's customers. The energy is not intended for parties outside the Town or for some other purpose within the Town. The energy is being produced and being sold to the BEC to be provided directly to its customers. As such, the assets are considered as dedicated to public use.

[67] Further, the electric power from the solar garden is provided exclusively to all the customers within the BEC's service territory. The BEC exercises a monopoly over

its franchise territory; i.e., all the customers within Berwick's town boundaries. In effect, the solar garden was constructed further to the duty to serve the BEC's customers. These factors weigh in favour of a finding that it is a public utility service that falls under the scope of the *PUA*.

[68] The construction of the solar garden and the sale of its electricity to the BEC, for its eventual distribution to the Town's electricity ratepayers, is a core public utility function.

[69] Berwick argued that the powers conferred upon it by the *MGA* allow it to construct and operate the solar garden and to sell the electric power to the BEC. While the express words of the *MGA* allow the Town to conduct these activities, the *MGA* is silent on whether the *Public Utilities Act* applies.

[70] In considering any potential conflict between the provisions of the *Berwick Electric Commission Act*, the *MGA* and the *PUA*, the Board is mindful of sections 116 and 117 of the *PUA*:

> **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.
>
> **Conflict with and application of**
>
> 117 (1) Any Act whether enacted before or after the fourteenth day of April, 1943, relating to a public utility as defined by this Act shall be read and construed as subject in all respects to the provisions of this Act and, in case of conflict, the provisions of this Act shall prevail unless the contrary intention is expressly stated. [Emphasis added]

[71] In the Board's view, there is no conflict between the provisions of the *MGA* and the *PUA*. The *MGA* is silent on the issue and the *PUA* states that the Board has oversight over an entity that provides a public utility service. To the extent that Berwick argues that the *MGA* allows it to provide the public utility service without the Board's oversight, including under s. 35, that does conflict with the *PUA* and the provisions of the *PUA* prevail because no "contrary intention is expressly stated" in the *MGA.*

[72] The Board considers this interpretation of the relationship between the *MGA* and the *PUA* also respects the "separate functions" of the Town, as canvassed in the Nova Scotia Court of Appeal's *East Hants* decision, discussed earlier. While the Town has the authority to carry out the activities set out in the *MGA*, where those powers result in the Town effectively providing what is at its core a public utility service to its residents, such activities appropriately fall under the scope of the *PUA*.

[73] In effect, the Town of Berwick and the BEC both carry out the core electric public utility function provided to the Town's ratepayers. As noted previously, the definition of "public utility" in the *PUA* includes any person who owns, operates, manages or controls the infrastructure used to provide electric service directly or indirectly to or for the public. Given that the assets are owned by the Town and operated or managed by the BEC, the public utility function is shared. Indeed, the Town effectively controls the BEC.

[74] Under s. 5 of the *Berwick Electric Commission Act*, the BEC's board of commissioners is comprised of four members, including (a) the Mayor, (b) one member appointed by the Council, who shall be a councillor; and (c) two members appointed by the Town Council, who shall not be councillors. The Mayor is the board chair. Under s.16, the BEC executive manager is also a member of the board. While the board appoints the

executive manager, that appointment is subject to the approval of Town Council. Further, under s. 6, the remuneration paid to the board members is determined by resolution of the Council. Under s. 8, the Town Clerk is the secretary and treasurer of the BEC. Also, based on prior applications considered by the Board, it understands that most, if not all, of BEC's staff are employees of the Town, whose costs are allocated between the two. For these reasons, the Board considers that the BEC does not operate at arm's length from the Town and is, in fact, controlled by the Town.

[75] While all the assets used to generate, transmit and distribute electric power to the residents have been owned by the Town since at least 1977, these assets have always been in the BEC's rate base and have invariably been submitted to the Board for approval if the amount exceeded that prescribed under the *Public Utilities Act* (currently $250,000). While the Board's oversight under the *Act* theoretically extends to the Town for any public utility service it provides to its residents, the Town and the BEC have always applied to have the municipal electric assets included in the BEC's rate base. The Board does not see any reason to depart from this established regulatory practice in the present circumstances. The Town's election to consider the solar garden assets as distinct from the assets it considers constitute the BEC's rate base is not determinative. Public utility assets cannot be removed from the Board's jurisdiction because of the way the Town elects to treat them for accounting purposes.

[76] Further, important objectives under the *Public Utilities Act* are to ensure just and reasonable rates for ratepayers, to ensure the utility recovers its prudently incurred costs and that an appropriate return is paid on the capital investment. The suggestion that assets that are used to provide a utility service would be made available to the utility

under contract from a controlling or affiliated municipal entity creates a risk that ratepayers would be subject to unnecessary or unreasonable costs to produce inappropriate returns for the benefit of non-utility municipal purposes. Where there is a danger that municipal ownership of assets could potentially shift costs from utility ratepayers to provide general revenue that would typically be derived from the Town's tax base, even if that occurs inadvertently, it is in the public interest and more appropriate to regulate such matters directly rather than indirectly. Such oversight may include issues like what is the appropriate return that should be paid by ratepayers on the assets and what are reasonable sustaining capital and operating expenses for the solar garden. This ensures that the generation, transmission and distribution of electric power is properly aligned with the interests of the utility and its ratepayers.

[77] Berwick also referred to the regulatory treatment afforded by the Board to AREA, suggesting that the circumstances relating to the solar garden were analogous so that the solar garden should not be subject to Board oversight under the *Public Utilities Act*. Mr. MacDuff suggested it was similar because the Town owns the solar garden and sells the electricity to the BEC under a PPA. Berwick also pointed to AREA's coordination of the joint funding application to the federal government for the Town's solar garden and AREA's oversight of a common Request for Proposal procurement process.

[78] The Board considers AREA's circumstances to be different than those related to Berwick's solar garden. In AREA's case, the wind farm assets are jointly owned by a municipal partnership, while the solar garden is solely owned by the Town of Berwick. As noted earlier in this decision, AREA has no service territory, no retail customers, no duty to serve, and sells electrical energy exclusively to four MEUs, as well as to NS Power

under the Spill Tariff. Further, AREA is not exclusively controlled by Berwick, or any one town, as is the case for the BEC. For the reasons noted above, Berwick's situation is quite different from AREA on these issues.

[79] Finally, Berwick argued that the magnitude of the expenditure on the solar garden and the financing arrangements require it to fall outside the Board's oversight. The Board does not consider these points as supporting Berwick's position. If anything, the magnitude of the expenditure on the solar garden would weigh in favour of *PUA* oversight. Given the significance of the solar garden's net book value to that of the BEC's rate base assets that are used to serve the BEC's customers, the solar garden should be subject to regulation under the *PUA* to protect the interests of the utility's ratepayers. The Board considers the solar garden to be, *de facto*, part of the BEC's rate base. On this point, the Board notes the relative value of the utility's existing assets in Antigonish compared to the projected value of its grid modernization assets recently approved by the Board in *Antigonish Electric Utility Grid Modernization Project*, 2023 NSUARB 222. In that case, there was no issue with the new assets being in the utility's rate base.

[80] Further, the Board does not accept Berwick's submission that including the solar garden assets in the BEC's rate base would offend the Province's debt to service ratio that applies to municipal units. While the Town differentiates its "General Capital" from its "Electric Capital" on its consolidated financial statements, this is only for presentation of its financial results. All the assets are owned by the Town. There should be no impact on the debt to service ratio regardless of how the assets are categorized. Moreover, Berwick cited the need for the revenue stream from a power purchase agreement to accommodate a guarantee provided by the Town to finance the assets.

However, it is accepted that a utility can recover its reasonable and prudent costs and a return under s. 45 of the *PUA*. This "regulatory compact" is well recognized by the financial community and would normally provide coverage for indebtedness related to the utility's assets.

[81] After reviewing the MEUs' submissions, the Board concludes that the solar garden constructed by the Town of Berwick, where the electric power is sold to the BEC to serve its customers, requires Board approval under s. 35 of the *Public Utilities Act*. In the words of *Re Camden Cogen, L.P.*, quoted in the *ATDES* decision, the proposed ownership structure for the solar garden assets is of such a nature that "the character and extent of a particular operation affects the public at large in a way which requires submittal to public regulation for the common good".

## 4.0 CONCLUSION

[82] The Board has determined that AREA is not a public utility. The Board has also determined that the solar gardens of all the MEUs are assets used to provide electrical energy to their respective customers. The solar gardens are, therefore, used by the MEUs to generate and supply electrical energy directly or indirectly to or for the public. As such, the capital costs of the solar gardens require Board approval. The Board orders that applications under s. 35 of the *Public Utilities Act* be made for the approval of the capital costs related to the solar gardens constructed in the Town of Antigonish, the Town of Mahone Bay and the Town of Berwick on or before June 1, 2025.

[83] An Order will issue accordingly.

**DATED** at Halifax, Nova Scotia, this 18th day of December, 2024.

Stephen T. McGrath

Roland A. Deveau

Richard J. Melanson