DECISION **2024 NSUARB 216**
M11912

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 2025 Demand Side Management Cost Recovery Rider (DCRR)

BEFORE: Stephen T. McGrath, K.C, Chair
Roland A. Deveau, K.C., Vice Chair
Steven M. Murphy, MBA, P.Eng., Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
Michael Willett, Director, Regulatory Finance

INTERVENORS: **CONSUMER ADVOCATE**
David Roberts, Counsel
Michael Murphy, Counsel

SMALL BUSINESS ADVOCATE
Melissa MacAdam, Counsel
Rebekah Powell, Counsel

EASTWARD ENERGY INCORPORATED
Allison Coffin, Director, Regulatory & Government Relations
Angela Costello, Analyst, Regulatory

EFFICIENCY ONE
James R. Gogan, Counsel

INDUSTRIAL GROUP
Nancy Rubin, K.C.
Brianne Rudderham, Counsel

TOWN OF ANTIGONISH
TOWN OF MAHONE BAY
BERWICK ELECTRIC COMMISSION
RIVERPORT ELECTRIC LIGHT COMMISSION
James MacDuff, Counsel

DEPARTMENT OF NATURAL RESOURCES AND RENEWABLES
Daniel Boyle, Counsel

RENEWALL ENERGY INC.
Daniel Roscoe, P. Eng.

BOARD COUNSEL: William L. Mahody, K.C.

FINAL SUBMISSIONS: December 10, 2024

DECISION DATE: **December 23, 2024**

DECISION: **The application is approved subject to a compliance filing to update the proposed charges to exclude interest.**

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1.0 INTRODUCTION

[1] In its decision in Nova Scotia Power Incorporated's last general rate application [2023 NSUARB 12], the Nova Scotia Utility and Review Board approved a Demand Side Management Cost Recovery Rider (DCRR) for costs associated with demand side management (DSM) programs developed and delivered by EfficiencyOne, a third-party regulated utility. On October 1, 2024, NS Power applied to the Board for approval of its 2025 DCRR effective January 1 through December 31, 2025. NS Power also asked for approval for the recovery of DSM costs from the Wholesale Market participants (which include the four Open Access Transmission Tariff Municipal Electric Utilities (MEUs)) through monthly billings of fixed installments as determined for each MEU in DSM Rider applications.

[2] The DCRR includes two components: a Program Cost Recovery (PCR) amount and a Balancing Adjustment (BA). The PCR is designed to recover the approved DSM program costs that NS Power pays to EfficiencyOne. The BA reconciles differences between the PCR amount billed in a previously completed calendar year and the actual cost of DSM during the same previously completed calendar year.

[3] This is the third year that the DCRR has been required to be set. The DCRR was initially set for 2023 in NS Power's general rate application and a rate was set for 2024 by Order of the Board dated December 13, 2023. However, these only included a rate for the PCR component. To incorporate a full year's actual results, the BA addresses differences in the second year after they were accrued. As such, the 2025 DCRR is the first time the BA component is being set (and it relates to DSM cost differences in 2023).

[4] NS Power's proposed DCRR rates were set out in Figure 1 in its application:

Figure 1: 2025 PCR and BA[8]

Applicable Tariff	PCR (Cents per kWh)	BA (Cents per kWh)	DCRR (Cents per kWh)
Domestic Service, Domestic Service Time-of-Day, Domestic Service Time of Use, Domestic Service Critical Peak Pricing	0.657	-0.026	0.632
Small General, Small General Time of Use, Small General Critical Peak Pricing	0.778	-0.026	0.752
General, General Time of Use, General Critical Peak Pricing, Multi-Unit Residential Unit (MURB) Pilot[9]	0.635	0.010	0.646
Large General	0.768	0.022	0.791
Small Industrial	0.720	0.034	0.754
Medium Industrial	0.306	0.008	0.315
Large Industrial including. Interruptible Rider	0.404	0.027	0.431
Municipal	0.650	-0.025	0.626
Unmetered Services	0.353	0.004	0.357
Gen. Replacement & Load Following	0.110	-0.071	0.039
One Part Real Time Pricing	0.095	-0.003	0.091
Shore Power	0.095	0.061	0.155

[Exhibit N-1, p. 4]

[5] Overall, NS Power owes money to customers through the BA this year; however, this varies by customer class and some classes owe amounts to NS Power. Rate classes owed money under the BA show a negative adjustment in the BA column in Figure 1. Some of the rate classes that are owed money would still see overall rate increases under the adjustments requested by NS Power due to offsetting increases in the PCR component, as shown in Figure 3 from the application:

Figure 3: 2025 PCR and BA - Effect of updated DSM Charges on Class Revenues.[13]

Rate Class	Percentage Increase		
	PCR	BA	Total
Domestic Service Tariff	0.2	(0.1)	0.1
Small General Tariff	-	(0.1)	(0.1)
General Tariff	0.3	0.1	0.4
Large General Tariff	1.1	0.2	1.3
Small Industrial Tariff	0.3	0.2	0.5
Medium Industrial Tariff	0.1	0.1	0.2
Large Industrial Tariff	0.5	0.2	0.7
Municipal Tariff (excluding OATT MEUs)	0.1	(0.2)	(0.1)
Unmetered	0.7	0.0	0.7
Total FAM Classes	0.3	(0.0)	0.2

Figures presented in the table are rounded to 1 decimal place.

[Exhibit N-1, p. 8]

[6] The Board considered this matter in a paper hearing. NS Power responded to information requests (IRs) and the Board received submissions from the Consumer Advocate, the Small Business Advocate, the Industrial Group and the MEUs.

[7] The Board approves the resetting of the DSM Rider, but the proposed BA charge must be adjusted to exclude all interest. NS Power is directed to update the DCRR charges in a compliance filing. Following this decision, the Board will establish a generic proceeding to more thoroughly address and consider issues arising from the application of s. 64AB to deferral and variance accounts, including those discussed in this decision. The Board will provide more guidance, including the possibility of establishing a formal rule for the assessment of interest. The Board's decision on the entitlement of NS Power and its customers to interest on BA balances from 2023 will be held in abeyance until

these matters are more fully considered and may, if interest is determined to be payable, be included in future DCRR adjustments.

2.0 DISCUSSION AND ANALYSIS OF ISSUES RAISED

2.1 Financing Costs under the Balancing Adjustment

[8] Variances in DSM costs and recovery occurring over time are intended to be addressed through the BA in the second year after they were accrued. Balances may be payable by or owing to customers. These balances attract financing costs and the interest rate for those costs was the subject of disagreement between NS Power and other parties in this proceeding.

[9] The payment of interest to NS Power is subject to s. 64AB of the *Public Utilities Act*, R.S.N.S.1989, c. 380, which came into force shortly before the Board's decision in NS Power's last general rate application:

> **Payment of interest**
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> **64AB (1)** The Board may approve the payment of interest to Nova Scotia Power Incorporated on an outstanding balance for the Fuel Adjustment Mechanism, or any other regulatory deferral.
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> **(2)** To be eligible for a payment of interest under subsection (1),
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> (a) Nova Scotia Power Incorporated must demonstrate a balance is outstanding, or there is a clear demonstrated prediction for an outstanding balance, for a period of not less than twelve months prior to a request for the payment of interest; and
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> (b) the minimum amount on an outstanding balance must be greater than one million dollars.
>
> **(3)** Interest must be calculated
>
> (a) from the date the balance is outstanding using simple interest at the Bank of Canada policy interest rate plus one and three-quarters per cent, unless otherwise directed by the Board; and
>
> (b) on a per year basis.

> **(4)** Any request for the payment of interest on an outstanding balance must include the interest calculations for the Board for review.

[10] The Board addressed this new legislation in its decision in the general rate application:

> [100] A basic principle of regulation, as noted earlier in this decision, is the ability of a utility to recover its prudently incurred costs. Most of the deferral balances that NS Power is requesting bear financing costs at its WACC [weighted average cost of capital] in this GRA are costs incurred in its normal course of operations. By definition, the weighted average cost of capital is the actual average carrying cost on each dollar spent, and not immediately collected, by the Utility. Those dollars are provided in part by debt, and in part by equity investment. Similar to the requirement for a down payment in order to obtain a mortgage on a home, debt is not available without the equity investment. NS Power must maintain a certain level of equity investment to comply with the terms of its debt agreements.
>
> [101] In the normal course, balances owing under NS Power's FAM [Fuel Adjustment Mechanism] would attract interest at NS Power's WACC. However, the Board has some difficulty with NS Power's suggestion that the Board may exercise its discretion under s. 64AB of the PUA [*Public Utilities Act*] to allow NS Power to recover interest on FAM balances at its WACC based on "accepted utility practice" and the "long-established practice in Nova Scotia." If that were enough, the Board would always be justified in exercising its discretion to award a different interest rate than the Bank of Canada policy interest rate plus 1.75% specified in s. 64AB(3)(a). This would tend to make the recent amendment meaningless, which the Board cannot assume was the intent. However, the Board finds it is not necessary to consider this question because it is satisfied there is sufficient justification for exercising its discretion to allow interest on NS Power's existing deferrals at NS Power's WACC.
>
> [102] The Board believes that approving the rate specified in Bill 212 on all of NS Power's existing deferrals has the potential to have a further negative impact on NS Power's credit ratings, and overall financial health. This would not be in the best interests of ratepayers. The Board is of the opinion that this is precisely why the legislation allowed for the Board's discretion in assigning this rate.
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> [103] As shown in the table above from NS Power's response to NSUARB IR-1, the existing deferrals all exceed $1 million, and they will be outstanding for more than 12 months. As such, the Board is satisfied that the requirements under s. 64AB(2) have been met.
>
> [104] In considering the interest rate for these deferrals, the Board finds that NS Power's recent credit downgrades are a relevant factor because they heighten concerns around NS Power's credit metrics and the risk of further downgrades, resulting in the potential imposition of even more costs on ratepayers. Credit ratings are a measure of the probability an organization will default on its financial obligations. The recent downgrade of NS Power's credit ratings commands the Board's attention. This is an indication that NS Power's financial health is perceived by the markets to be at a higher level of risk than it was several months ago.
>
> [105] The Board notes NS Power's concern that setting the stated interest rate in Bill 212 on its regulatory deferrals could be setting its return on the equity invested in those balances at a lower rate than its bondholders are receiving. It appears that this would

increase the risk to the financial health of the Utility. In this instance, the Board believes that stability and predictability are paramount.

[106] The Board concludes that in the circumstances, it is appropriate for it to exercise its discretion under s. 64AB(3) to set interest on the deferrals in the table above at NS Power's WACC (subject to the comments below about the Annapolis Tidal Generation Facility).

[107] Additionally, there are other reasons why approving interest at NS Power's WACC on FAM balances is appropriate. As discussed later in this decision, NS Power will defer a significant amount of fuel costs it expects to incur so rates are reduced in the current application. The parties have also agreed to discuss potential further deferrals of these costs to manage rate impacts. While it comes at a longer-term cost, the management of these rate impacts is a benefit to ratepayers in the circumstances of this proceeding.

[108] The Board also notes that FAM balances may relate to both over- or under-recoveries. In the case of over-recoveries, the balances are returned to customers with interest at NS Power's WACC. To be equitable, the interest rate paid to customers on over-recoveries and received from customers on under-recoveries should be the same.

[109] Regarding the potential future deferrals for the DSM Rider, the Storm Rider, the DDA [Decarbonization Deferral Account], and the Cost of Service and Line Loss Studies, the Board finds that, considering s. 64AB of the PUA, the request for interest relating to these items is premature. It is not known whether any balances under the DSM and Storm Riders will exceed $1 million or if they will be outstanding for at least 12 months.

[110] While balances in the DDA would be expected to meet these requirements, as discussed later, the Board accepts the DDA in principle but it is not formally approving a DDA at this time. Any application for interest relating to the DDA should proceed at the time of seeking formal DDA approval and following the agreed upon stakeholder consultative process.

[111] In expert evidence and during the hearing, securitization was presented as a possibility to mitigate the significant carrying costs associated with future retirement of NS Power's thermal plants. The Board sees this as a possibility to reduce the carrying costs on the DDA in the future. However, there is due diligence that would need to be completed to determine if this is a viable option for NS Power, and in the best interests of customers.

[112] Finally, for all the items for which the Board is not approving a rate for the recovery of interest at this time, the circumstances at the time of a future application for interest may be different, particularly relating to NS Power's credit ratings and access to debt financing. This, along with other factors, may have an impact on the exercise of discretion about the appropriate interest rate on deferrals.

[113] In the case of the Annapolis Tidal Generation Facility, and as discussed later in this decision, the Board is not approving the creation of a regulatory asset at this time as NS Power has not addressed the concerns the Board expressed in denying its previous application to have the facility declared not used and not useful (M10013).

[114] For the existing deferrals approved for the recovery of interest at NS Power's WACC discussed above, the Board directs NS Power to provide forecasted interest calculations to the end of 2024 in its compliance filing.

[2023 NSUARB 12, pp. 48-52]

[11] The carrying costs associated with the DCRR were not specifically raised or addressed when the Board set the DCRR rate for 2024. The Board directed NS Power to address this issue more specifically in its 2025 application. In this application, NS Power submitted it is appropriate to use its weighted average cost of capital for variances under the BA.

[12] NS Power's justification for the use of its weighed average cost of capital is summarized as follows:

- NS Power is regulated under a cost-of-service model and its expected actual cost of financing investments is based upon its approved capital structure, interest costs and return on equity.
- Regulatory assets are a part of NS Power's rate base and, under s. 45 of the *Public Utilities Act*, it is entitled to earn a just and reasonable return on its rate base. NS Power said its just and reasonable financing costs are its approved weighted average cost of capital.
- Using the weighted average cost of capital to determine the cost of financing utility fixed assets and deferred costs is an accepted utility practice and has been the long-established practice in Nova Scotia.
- The "regulatory compact", which NS Power said is codified in s. 45 of the *Public Utilities Act*, requires it to be given an opportunity to recover its costs and a reasonable return on its investment.

[13] NS Power submitted the regulatory compact was an imperative that was not altered by the legislation:

> Subsection 64AB(3)(a) of the PUA neither alters this imperative nor affects the Board's authority to approve NS Power's WACC as the amendment explicitly recognizes that interest is to be calculated "from the date the balance is outstanding using simple interest

> at the Bank of Canada policy interest rate plus one and three-quarters per cent, unless otherwise directed by the Board" …. The Supreme Court of Canada has been clear that discretion such as this "is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation." Interpretation of the PUA, including subsection 64AB(3)(a), is therefore to be guided by the regulatory compact, which must be assumed to exist to the fullest extent possible.
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> [Exhibit N-1, p. 13]

[14] Intervenors in this proceeding questioned the use of NS Power's weighted average cost of capital for BA balances. Indeed, the Consumer Advocate questioned whether NS Power was entitled to any interest at all, given the outstanding balance is not greater than $1 million. As mentioned previously, NS Power's application shows a net amount payable to its customers; however, some rate classes are owed by NS Power and other rate classes owe NS Power.

[15] In its reply submissions, NS Power said although the BA balance was less than $1 million as of December 31, 2023, it was more than $1 million from February to July 2023. It submitted that relying solely on the year-end balance to determine whether interest should be charged ignored the potential for significant deferral balances to arise and be financed over the course of the year. It said given the BA balance exceeded $1 million during the year interest can, and should, be charged.

[16] The Consumer Advocate said NS Power's position that it is entitled to its weighted average cost of capital on all its regulatory deferral balances (Exhibit N-3, Consumer Advocate IR-3 (b)) is problematic and does not conform with the spirit of s. 64AB. The Consumer Advocate also submitted that NS Power's calculation of interest on a monthly basis, compounded semi-annually, seemed inconsistent with the statutory requirement that interest be calculated "on a per year basis".

[17] NS Power said its calculation of interest is based “on a per year amount”. NS Power said it “takes the per year amount and divides it by 12 so that a portion is recorded each month.” It also submitted that semi-annual compounding is consistent with NS Power’s FAM interest calculations.

[18] The Consumer Advocate also challenged NS Power’s assertion that using a utility’s weighted average cost of capital for deferral balances is accepted utility practice:

> NS Power’s position is also inconsistent with regulatory practice in other jurisdictions which typically allow a lower interest rate for deferral balances. For example, the Ontario Energy Board (OEB) allows an interest rate for deferral and variance accounts equal to the three-month T-bill rates plus a fixed spread of 25 basis points. By comparison, the Alberta Utilities Commission (AUC) allows interest to be calculated from the date the balance, adjustment or cost is outstanding using simple interest at the Bank of Canada policy interest rate plus 1¾ per cent, unless otherwise directed. In British Columbia, BC Hydro calculates interest in its deferral accounts using its weighted average cost of debt (i.e. not its average cost of capital including a return on equity). (Footnotes omitted)
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> [Consumer Advocate Submissions, December 3, 2024, p. 4]

[19] NS Power said it was inappropriate to consider the interest rates applied in these jurisdictions because they were out of context. It suggested these rates were influenced by the specific characteristics and entities in each regulatory regime, particularly in respect of factors relating to differences in debt-to-equity ratios and limitations on the amount of the return that may be earned.

[20] The Industrial Group said DCRR financing costs should bear the same rate of interest as underspent DSM program funds held by EfficiencyOne that may ultimately be repaid to NS Power for the benefit of ratepayers. As there was no evidence filed about EfficiencyOne’s interest rate for 2023 in this matter, the Industrial Group said the Board should use the statutory rate in the *Public Utilities Act*. The Industrial Group emphasized that customers are potentially paying additional financing costs to NS Power for under collection when more than enough payment has been made to EfficiencyOne

and interest is accruing on the unspent balances. The Industrial Group said this lack of coordination between NS Power and EfficiencyOne results in unnecessary and unfair costs to customers.

[21] NS Power submitted that as it was carrying deferral balances, its financing costs, not EfficiencyOne's, were more appropriate. While NS Power agreed that EfficiencyOne's interest rate was unknown, it questioned whether EfficiencyOne using NS Power's weighted average cost of capital would present potential solutions to the Industrial Group's concerns about the various interest rates used by each utility.

[22] The Industrial Group also submitted that the Board has rejected the notion that a weighted average cost of capital must be used because it is consistent with accepted utility practice and the long-standing practice in Nova Scotia, citing comments from the Board's decision in NS Power's most recent general rate application. The Industrial Group stated:

> Here, a presumptive interest rate has been set by the legislation, and as part of the Board's explicit rate-making authority, it has been granted the power to maintain the presumptive interest rate, or in its discretion direct otherwise. This is not an issue of *if* the Board has the jurisdiction to set a reasonable interest rate, but rather *how* that jurisdiction is exercised. NSPI seems to be arguing that it is confiscatory to not allow it to earn interest at WACC and it has an entitlement to profits under the "regulatory compact". With respect, this overlooks the statutory scheme and authority granted, which implicitly reflects the "regulatory compact". The legislature has determined a backstop interest rate, and granted the Board the power to direct otherwise. This discretion should be exercised when it is in the public interest to do so. In this case, there is no legitimate customer interest which needs to be protected by setting interest at WACC. Conversely, there is a public interest not to do so. (Emphasis in original)
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> [Industrial Group submissions, December 3, 2024, p. 4]

[23] NS Power emphasized in its reply submissions that using its weighted average cost of capital as the appropriate interest rate was not solely based on accepted or long-standing practice. It argued that the default rate in the legislation was sufficiently overcome by the type of evidence used to establish its cost of debt and approved cost of

equity. Indeed, it submitted where such evidence was used, the Board was "always justified in exercising its discretion to award a different interest rate" than the statutory rate.

[24] NS Power said using the statutory rate would result in it recovering more or less than its actual financing costs depending upon the Bank of Canada policy rate at any point in time. It also said its credit ratings were a significant factor in the Board's general rate application decision, and argued these have not improved since that decision. NS Power also said the use of a rate lower than its weighted average cost of capital implied it had the balance sheet capacity to finance deferrals with a higher percentage of debt than approved by the Board in its regulated capital structure.

[25] NS Power noted:

> This year, the use of WACC [weighted average cost of capital] will benefit customers, as NS Power would then be refunding the full benefit to customers. If the interest rate set out under the PUA is used as proposed by the CA [Consumer Advocate], then customers will not see the full potential benefit of this refund. Similarly, if in future years NS Power under-collects DSM costs and additional recovery is required, it is important that the actual cost of financing is reflected so that an opportunity for full recovery is provided. A true reflection of the returns payable to customers and the cost of DSM programming to the utility is only achievable if WACC is used. The use of the default interest rate prescribed by the PUA is very likely to result in underpaid benefits to customers in some years and under recovery by NS Power in others, with no guarantee that these two factors will balance out. Given this, NS Power submits that the interest rate that should be used for the DSM rider is NS Power's WACC, and that the Board's discretion under s. 64AB of the PUA should be applied.
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> [NS Power reply submission, December 10, 2024, p. 4]

[26] In the alternative, the Industrial Group submitted that if the Board accepted that it is appropriate to use NS Power's weighted average cost of capital, then the 2023 rate should be used instead of the rate for 2024 that NS Power used in its application. While NS Power agreed this was an error, it noted this error resulted in an additional amount of approximately $2,800 being refunded to customers. It submitted that updating this amount would delay implementing the DCRR, resulting in the need for future

true-ups. It agreed to use the weighted average cost of capital in the appropriate year in future filings but declined to adjust the rate this year.

2.1.1 Findings

[27] Although s. 64AB of the *Public Utilities Act* quite explicitly applies to NS Power's Fuel Adjustment Mechanism (FAM), the FAM and the DCRR are deferral and variance accounts of a type that generally share the following characteristics:

- They are intended to address variances between forecast and actual costs, frequently for costs that the utility is unable to reasonably predict or control.
- These variances could be to the benefit of the utility or its customers.
- The variances are often revolving in nature and regularly reconciled.
- Any over- or under-recovery of costs in rates due to these variances are typically quickly recovered by the utility or promptly returned to customers. The short-term recovery or repayment benefits the utility's financial health, particularly if variances are significant. It also addresses concerns about intergenerational equity by ensuring that costs payable by or to customers for past utility service are more likely to be the same customers who received the service.
- Variances that are differentiated by rate class could produce opposite results at the same time (e.g., variances in a defined period could result in one rate class having overpaid during the period while another rate class underpaid). As a result, the utility would owe money to one rate class and be entitled to a recovery from another.

- As the Board noted in its decision in NS Power's recent general rate application, to be equitable, the interest rate paid to customers on over-recoveries and received from customers on under-recoveries should be the same.

[28] While s. 64AB applies to these types of deferral and variance accounts, the way the section applies to them raises several questions that the Board finds are not clearly addressed in the language used in the legislation. The interpretation of s. 64AB of the *Public Utilities Act* is guided by well recognized principles of statutory interpretation that are applied by all levels of courts and tribunals throughout the country. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, a majority of the court summarized these principles and noted the assumption that legislators intend that administrative decision makers such as this Board will interpret the law consistent with these principles:

> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, 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 CanLII 837 (SCC), [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.
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> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[29] The majority in *Vavilov* noted that the application of these principles by administrative decision makers may look different than the interpretive exercises

undertaken by courts. However, they emphasized that regardless of the form of analysis, the interpretation must be consistent with the text, context and purpose of the provision:

> [119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.
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> [120] 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. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.
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> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome. [Emphasis added]

[30] As noted in the passages from *Vavilov* cited above, the Parliament of Canada and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations. In Nova Scotia, this guidance is found in 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.
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> …
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> **(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
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> (a) the occasion and necessity for the enactment;
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> (b) the circumstances existing at the time it was passed;

> (c) the mischief to be remedied;
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> (d) the object to be attained;
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> (e) the former law, including other enactments upon the same or similar subjects;
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> (f) the consequences of a particular interpretation; and
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> (g) the history of legislation on the subject.

[31] NS Power's reference to the "regulatory compact" is relevant context for interpreting this provision. As noted by the Board in NS Power's last general rate application, the ability of a utility to recover its prudently incurred costs is a basic principle of rate regulation. In that decision, the Board also referred to the Nova Scotia Supreme Court, Appeal Division, discussion of the principles enshrined in the *Public Utilities Act*, in what has sometimes been referred to as the "Contracts Case", and they bear repeating here:

> [39] The Nova Scotia Supreme Court, Appeal Division decision in Nova Scotia *(Public Utilities Board) v. Nova Scotia Power Corporation*, (1976) 1976 CanLII 1234 (NS CA), 18 N.S.R. (2d) 692 (the Contracts Case) is often referenced for its consideration of the scheme of regulation under the PUA:
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> > 17 The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined - that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects - that a public utility give adequate service and charge only reasonable and just rates.
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> > 18 The service requirement is expressed in s. 48, as follows:
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> > > 48 Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.
> >
> > 19 This general requirement is supplemented by provisions such as s. 25 respecting pole line standards, s. 52 prohibiting electric voltage and frequency variations of more than 4% and ss. 49-51 respecting abandonment or duplication of service, and by rules and regulations made by the Board for each utility's operation. Compliance with this requirement is accomplished by the Board's continuing supervision of a utility (s. 19), by requiring a utility to submit to the Board detailed reports and accounts, "to show completely and in detail the entire operation of the public utility in

furnishing its product or service to the public" (s. 33; also ss. 26, 45-47). The Board may investigate the adequacy of service on its own motion (s. 18) or on complaint (s. 78(1)), and by its staff may inspect books of a utility (s. 75) and make tests or examinations to determine the safety and adequacy of service (s. 77).

20 Rates must be "just" (s. 41) and must not be "unreasonable or unjustly discriminatory" (s. 18 and s. 78(1)), or "unjust, unreasonable, insufficient or unjustly discriminatory, or . . . preferential" (s. 82(1)). The "justness" of rates has two aspects - rates of a utility as a whole must be "reasonable" and just for the public it serves and just and "sufficient" for the utility itself - and the rates for the various customers or classes of customer of a utility must not as between each other be "unjustly discriminatory" or "preferential".

21 The control of the over-all level of rates has its keystone in s. 42(1) which states:

> 42 (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 . . .

…

23 The concept of a utility securing a reasonable return on its rate base automatically makes specific the apparently vague standard that rates be "just". The utility's economic health and its ability to supply adequate service and to finance capital expansion are assured by giving it a "just and reasonable" return. Overall rates must thus be sufficient to produce that return after allowing operating expenses and other "just allowances" (s. 42(2)). The rates must thus be "sufficient" to produce that return, no less and no more.

24 The public interest charges the Board with the duty of ensuring no extravagance by a utility in either capital or operating expenditure. The rate base is to include only assets "used and useful" in providing service (s. 29 (1)). Additions to it are controlled by the requirement that Board approval be secured for any new construction project of more than $5,000 (s. 34 as amended). The expenses for rate-making purposes are only those the Board allows "as reasonable and prudent and properly chargeable to operating account" (s. 42(2)). Other "just allowances" are prescribed by the Act and Regulations, e.g. annual depreciation charges (ss. 35-38).

…

26 The Board has on occasion summarized its duty in terms which, accurately I believe, emphasize the comprehensive nature of its control of the rates and services of a utility. Its decision of February 25, 1970, in respect of an application of Maritime Telegraph and Telephone Company Limited, contains the following at p. 25 of the Board's Report for 1970:

> A public utility is obligated to provide services that are reasonably safe and adequate and is entitled to compensation therefor by the charging of rates that are

> not unjustly discriminatory and will provide the public utility with sufficient revenue to enable it to pay its operating expenses including depreciation and income taxes, and have net earnings sufficient to enable it to obtain and service normal and needed capital requirements. It is expected to meet reasonable demands for additional services and to conduct its affairs with efficiency. When an application is made to this Board for approval of revisions in rates, tolls and charges designed to produce additional revenue the public utility is required to produce evidence showing the needs and purposes for which such additional revenue is required. And upon any such application the Board inquires into and examines the adequacy and reasonableness of existing services, the efficiency of the public utility, the nature and extent of the needs and purposes upon which the application is grounded and the propriety of the proposed rate changes.
>
> 27 The "propriety" of the rates involves not only the propriety of their over-all level as adjudged by rate base return, but also their propriety for the various classes of customer. The Board's twofold duty is to ensure that the rates as a whole are reasonable and that they are reasonable to all customers inter se. This latter aspect of its duty is imposed by the various provisions prohibiting unjust discrimination and requiring equal rates in substantially similar circumstances. [Emphasis added]
>
> [2023 NSUARB 12]

[32] However, these principles can be altered by legislation, and the enactment of s. 64AB must be given some meaning. It clearly affects the Board's ability to approve the payment of interest.

[33] To be eligible for a payment of interest, NS Power must demonstrate under s. 64AB(2) that a balance owing is outstanding or will be outstanding for more than a year and "the minimum amount on an outstanding balance must be greater than one million dollars". As noted above, the Consumer Advocate questioned whether the proposed recovery of the variance in DSM costs from 2023 satisfied the statutory requirement for the payment of interest at all because the outstanding balance is less than $1 million. NS Power argued that, although the ending balance is less than $1 million, there was a balance greater than $1 million between February and July of 2023. Therefore, it argued, the threshold was met. There may be another possible interpretation

as well, given that s. 64AB states there must be an outstanding balance for more than 12 months and the minimum amount on an outstanding balance must be greater than $1 million. That is the threshold amount must be outstanding for the entire 12-month period. Unfortunately, none of the parties in this matter engaged in any sort of interpretive analysis to assist the Board in assessing whether the prerequisites for the recovery of any interest has been met.

[34] Furthermore, upon review of Appendix A-2 in the application (Exhibit N-1; Exhibit N-1(ii)C), it appears that the outstanding balances that exceeded $1 million between February and July 2023 were amounts *payable to* customers rather than owing from them. Given that s. 64AB(1) authorizes the Board to approve the payment of interest to NS Power on an outstanding balance, and the prerequisites in s. 64AB(2) explicitly relates to such payments, the Board would have anticipated some sort of attempt to connect how an amount of money owing to customers could satisfy the monetary threshold for the payment of interest to NS Power. None was provided.

[35] In its decision in NS Power's recent general rate application, the Board noted that variance accounts such as NS Power's Fuel Adjustment Mechanism, which could result in the repayment of over- or under-recoveries from customers should operate reciprocally so that the interest rate paid to customers on over-recoveries and received from customers on under-recoveries is the same. The DCRR is a variance account that operates in a similar way. However, s. 64AB does not appear, at least explicitly, to address the interest payable to customers by NS Power. Given that the Legislature would be presumed to understand that this reciprocal interest arrangement was a component of the FAM, it might be suggested that the provision implies there would be no payment of

interest to customers when NS Power is not entitled to recovery interest. Indeed, this issue is even more acute in this case, and begs a resolution, when NS Power owes money to some customer classes and is owed money by others. However, while the Consumer Advocate questioned whether NS Power was entitled to any payment of interest from some customers, he was silent on whether NS Power should, at the same time, be required to pay interest to other customers (or at what rate). Similarly, NS Power's historical practice of compounding interest semi-annually was questioned, largely in passing, by the Consumer Advocate and very briefly addressed by NS Power (mostly based on its historical practice and completely ignoring the reference to "simple interest" in s. 64AB(3)(a)). Once again, no serious attempt at framing these positions through any meaningful interpretive analysis of s. 64AB was provided.

[36] The Board considers that resolving these outstanding questions about the thresholds for triggering any entitlement of interest are necessary. But the record and submissions in this proceeding offer little assistance to that task. The Board declines to embark on such an analysis on its own in the absence of an acceptable record with appropriate notice of the issues to be canvassed.

[37] NS Power also asked the Board to make a finding on the interest rate to be applied to the DCRR on potential balances in the future even if it determined that interest was not payable in the present case. However, the Board declines to do so for similar reasons. Beyond the poor quality of the record in this proceeding, the Board notes that the unresolved questions about how the threshold requirements in s. 64AB apply to deferral and variance accounts, such as the DCRR, may have a bearing on the rate itself. For example, if the proper interpretation of s. 64AB is such that it requires NS Power to

pay interest to customers in circumstances when it would not be entitled to interest itself, this may be a factor warranting consideration when a rate is assessed in cases where it is entitled to interest. Additionally, as the Board noted in paragraph 112 of its decision in NS Power's recent general rate application, the circumstances at the time of any specific request for the payment of interest might be different at different times and might therefore warrant different rates. That said, the Board offers the following general comments to assist the parties with this issue.

[38] The Board considers that s. 64AB establishes a default interest rate for deferrals, including variance accounts such at the DCRR, "using simple interest at the Bank of Canada policy interest rate plus one and three-quarters per cent". However, the Board has the discretion to authorize a different interest rate. If it is seeking an interest rate exceeding the default rate in the legislation, the Board finds the burden is on NS Power to demonstrate that it is entitled to a different rate. The legislation is silent on the factors the Board may consider in deciding whether a different interest rate should apply.

[39] As set out in NS Power's response to Board IR-1(b), NS Power's position is that all its deferrals are financed at its regulated capital structure using a combination of both debt and equity, which it says more accurately represents its cost of financing. NS Power states in its reply submissions that if "evidence that has been used to establish the cost of debt and an appropriate proxy for the cost of equity that has then been approved by the Board, then NS Power believes the Board is in fact always justified in exercising its discretion to award a different interest rate than the Bank of Canada policy interest rate plus 1.75%."

[40] If this were enough to satisfy the burden on NS Power to displace the default interest rate in the legislation, the Board is hard-pressed to envision a scenario when the default interest rate would apply. NS Power's capital structure and return on equity are subject to review and approval in every general rate application and its actual cost of debt is reviewed annually. Furthermore, government would have been well aware of the Board's regular and evidence-based approvals of NS Power's capital structure and cost of capital, so NS Power's interpretation suggests that government enacted s. 64AB understanding that the default interest rate would likely never be applied. The Board simply cannot accept this interpretation. The legislation must be given meaning.

[41] In its reply submissions, NS Power also noted that its credit ratings were a factor in the Board's decision to approve financing costs for deferrals at its weighted average cost of capital in its last general rate application, noting that its credit ratings have not changed since the general rate application. While the Board continues to consider that NS Power's credit ratings are a relevant factor to consider when determining whether an interest rate other than the default rate should be used to calculate interest, no specific evidence about NS Power's credit ratings or current financial position was put before the Board in this proceeding. In future proceedings, it will be important for NS Power to produce evidence about the prevailing circumstances of the factors it wants the Board to consider and weigh in determining whether anything other than the statutory default rate should be used.

[42] In this case, the Board accepts that the credit ratings themselves may not have changed since NS Power's last general rate application, but part of the Board's concern at that time was the recency of those ratings adjustments. NS Power has not

offered any evidence of its current circumstances. For example, in addition to having been stable since that time, NS Power and its customers have been favourably affected by recent government support and other regulatory interventions, including the following:

- A Decarbonization Deferral Account was approved in principle in NS Power's last general rate application for the recovery of costs NS Power will incur due to the premature decommissioning of assets to meet decarbonization commitments, with details for this more recently considered and approved by the Board [2024 NSUARB 67].
- The Province of Nova Scotia and NS Power entered into an agreement under which Invest Nova Scotia purchased $117 million of NS Power's outstanding fuel costs, which was approved by the Board [2024 NSUARB 71].
- A regulatory asset to allow for the recovery of approximately $25 million in operating, maintenance and general costs relating to Hurricane Fiona in September 2022 was approved [2024 NSUARB 116].
- NS Power, NSP Maritime Link Inc. (NSPML), the Province of Nova Scotia and the Government of Canada reached an agreement under which the federal government would guarantee a $500 million loan to NSPML, the proceeds of which (less financing fees) would be refunded to NS Power to reduce a significant balance that had accumulated under NS Power's Fuel Adjustment Mechanism for recovery from customers. The creation of the regulatory asset for NSPML to recover the loan over time was approved by the Board [2024 NSUARB 199].
- A pilot storm cost recovery rider was approved in NS Power's last general rate application and was recently implemented to approve the recovery of $24 million

in excess operating, maintenance and general costs, and related financing costs, from 2023 [2024 NSUARB 200].

[43] On a different point, the Board considers that NS Power's assertions about the recovery of deferrals based on the utility's weighted average cost of capital as accepted utility practice appears to have been seriously challenged by the Consumer Advocate's reference to practices in other jurisdictions in Canada involving several utilities. NS Power's response cautioned against considering the rates used in other jurisdictions out of context from differences in those regulatory regimes and regulated entities. However, the significance of the Consumer Advocate's submissions is that they highlight accepted use of financing costs other than at a utility's weighted average cost of capital. NS Power's response did not really address this basic point. That said, as in the case of other submissions in this matter, the analysis on this point was minimal. The Consumer Advocate's submissions merely included a short statement with a few footnote references and NS Power's response lacked detail as well.

[44] Another factor is the nature of the BA deferral account. It is intended to address short-term variances in DSM costs that would be expected to be recovered or refunded in a short period of time. The Board considers the nature of such an account, which addresses incidental mismatches of costs for the benefit of both NS Power and its customers rather than planned investments, may also be a factor to consider, along with the amount of the outstanding balance and its potential implications for NS Power's credit rating.

[45] The Board approves the resetting of the DSM Rider, but the proposed BA charge must be adjusted to exclude all interest. NS Power is directed to update the DCRR

charges in a compliance filing. Following this decision, the Board will establish a generic proceeding to more thoroughly address and consider issues arising from the application of s. 64AB to deferral and variance accounts, including those discussed in this decision. The Board will provide more guidance, including the possibility of establishing a formal rule for the assessment of interest. The Board's decision on the entitlement of NS Power and its customers to interest on BA balances from 2023 will be held in abeyance until these matters are more fully considered and may, if interest is determined to be payable, be included in future DCRR adjustments.

2.2 The Application of the Balancing Adjustment and the Tariff Language

[46] The Industrial Group submitted that the true-up mechanism under the DCRR approved by the Board in NS Power's recent general rate application and the tariff language were not consistent with how it was being applied in practice. Specifically, rather than the BA accounting for variances in EfficiencyOne's actual program spending (across rate classes) in each year, these differences are not contemplated to be trued up until the end of the term of the current Supply Agreement for DSM between EfficiencyOne and NS Power, which will not occur until the end of 2025 (and every five years thereafter for future agreements). Instead, the Industrial Group noted that only differences due to load variation are regularly captured in the BA on an annual basis. The Industrial Group submitted that either the tariff wording should be amended, or the practice needs to change so that the actual cost of the approved DSM program is trued up annually by rate class for EfficiencyOne's underspend or surplus.

[47] NS Power submitted there was no inconsistency between practice and the tariff language because the periodic payments it makes to EfficiencyOne are its actual

PCR costs in any given year. Additionally, NS Power noted that the multi-year structure of the Supply Agreement results in variations in spending throughout the term of the agreement and, until the end, it cannot be determined whether there was an underspend. That said, it advised that if changes to the language in the DSM Rider could lead to more clarity about the distinction between the DSM Rider and the Supply Agreement, it would be open to such revisions.

2.2.1 Findings

[48] To the extent that the tariff currently refers to "the actual costs of the Approved DSM during the same previously completed calendar year", the Board agrees with NS Power that this refers to PCR costs incurred by NS Power, not EfficiencyOne. As the Supply Agreement is presently structured, the existence of any underspending to be returned to NS Power and customers cannot be determined until the end of its term.

[49] As discussed in the next part of this decision, issues relating to DSM costs payable by customers due to the structure of Supply Agreements between EfficiencyOne and NS Power may be further explored in EfficiencyOne's next application for the approval of DSM program costs, which is expected to be filed in 2025 for a five-year program beginning in 2026. Pending any changes arising in that process, the Board finds there is no present need to vary the tariff language for the DCRR.

2.3 EfficiencyOne Mid-course Adjustments and Changes to Class Allocations

[50] The Industrial Group expressed concern about unexpected cost impacts on customers arising from variations in EfficiencyOne's planned and actual DSM program spending by customer class and its ability to make mid-course adjustments. The Industrial Group said these could result in unexpected and significant impacts on customers as

DSM costs shift between rate classes. While recognizing that EfficiencyOne's ability to make mid-course adjustments was not a matter within the scope of the present proceeding, the Industrial Group said coordination was needed between EfficiencyOne and NS Power to ensure that there were no significant impacts on customer classes at the end of the term of a Supply Agreement. Therefore, in addition to recommending that the DCRR tariff language be reviewed and revised, the Industrial Group asked the Board to direct NS Power to report annual underspending or extra program costs by customer class in future DCRR applications, so that ratepayers can track and anticipate future DCRR increases or refunds.

[51] In its reply submissions, NS Power noted that providing the information requested by the Industrial Group was challenging because the information required to perform the calculations is, for the most part, held by EfficiencyOne. NS Power submitted that the information is not required for the Board to decide this application but committed to raising the issue with the DSM Advisory Group.

2.3.1 Findings

[52] The Board appreciates the concerns raised by the Industrial Group about the inter-class shifting of DSM program-related costs and the fact that the move to five-year terms for future DSM program periods may exacerbate the potential customer class rate impacts of doing so. While the issue should be raised with the DSM Advisory Group as NS Power suggests, the Board also expects that this issue will be considered in EfficiencyOne's anticipated application for the approval of its DSM program costs for the five-year period beginning January 1, 2026. The Board notes that EfficiencyOne is an intervenor in this proceeding. It should take notice of the concerns raised by the Industrial

Group and be prepared to address them in its pending application in early 2025 for the approval of a new DSM program and Supply Agreement.

2.4 Changes to Cost-of-Service Methodology

[53] The Consumer Advocate noted that residential customers were allocated a larger portion of DSM system benefit costs based on their share of demand and energy allocators. He also noted that the system benefit methodologies are being reviewed in NS Power's ongoing cost-of-service proceeding (M11475). The Consumer Advocate asked the Board to direct NS Power to update the Board of any changes to the system benefit methodology that may result from the cost-of-service proceeding. In response, NS Power noted than any changes to the cost-of-service methodology will form part of a cost-of-service application to the Board and any changes will apply on a go-forward basis and do not impact this proceeding.

2.4.1 Findings

[54] Any cost-of-service changes will be submitted to the Board in future proceedings. Therefore, the direction the Consumer Advocate requested in this proceeding is not needed.

2.5 DSM Costs and Port Hawkesbury Paper

[55] During this proceeding, the Small Business Advocate presented NS Power with a request for information about the potential that Port Hawkesbury Paper switches service from the ELIADC tariff to one where it pays DSM costs, and the potential impact on DCRR rates if it did so. NS Power said it had not completed calculations for these hypothetical scenarios.

[56] In her closing submissions, the Small Business Advocate considered the requested information relevant because Port Hawkesbury Paper's current ELIADC tariff is coming to an end in December 2025. She asked the Board to direct NS Power to provide responses to these questions. NS Power submitted that these questions were not relevant in the current proceeding and that such scenarios were better dealt with in the expected proceeding for a new future tariff for Port Hawkesbury Paper. The Board agrees.

2.6 System Load Factor

[57] The Small Business Advocate also questioned differences in the "Further Classification" amounts in Appendix A-1, columns H and I, p. 4 in this application, compared to similar information from NS Power's most recent general rate application. NS Power noted that these differences were because of changes to the system coincident load factor in the different test years. The Small Business Advocate submitted this was not fully responsive to her questions because it did not explain why the difference between the two test years was appropriate. The Small Business Advocate also submitted it is important for NS Power to address how changes relating to this in its ongoing cost-of-service proceeding would affect the DCRR in 2025 and future years.

[58] NS Power, in its reply submissions, said it is important to use the updated system coincident load factor in the DCRR calculations to reflect the relevant test year usage. It also noted that any potential changes to the system load factor in the cost-of-service proceeding will be submitted to the Board and apply on a go-forward basis, with no impact on the 2025 DSM Rider.

2.6.1 Findings

[59] The Board accepts NS Power's submissions and declines to direct any further responses to the Information Requests asked by the Small Business Advocate in this proceeding. As noted previously, any changes to NS Power's cost-of-service methodology will be addressed in future Board proceedings.

2.7 Monthly Payments by Municipal Electric Utilities

[60] As mentioned at the beginning of this decision, NS Power seeks Board approval for the recovery of DSM costs from the MEUs through monthly billings of fixed installments as determined for each MEU in DSM Rider applications. In closing submissions, the MEUs advised they agreed with the proposed amounts for recovery from them for 2025. They noted that the DSM Rate Rider is being discussed in NS Power's ongoing cost-of-service proceeding and anticipate that any changes in the allocation of DSM costs would be implemented on a go-forward basis as part of the 2026 DCRR application. NS Power agreed.

2.8 Legal Argument in Evidence

[61] In its closing submissions, the Industrial Group submitted there has been a progressive and growing body of material tendered by NS Power (and its consultants) that is nothing more than legal argument and opinion under the guise of "evidence". The Industrial Group referenced s. 4.1 of the application in this proceeding as an example. The Industrial Group asked the Board to provide general directions on the proper scope of evidence versus submissions in this decision.

[62] In its reply submissions, NS Power submitted that the information provided in s. 4.1 of its application responded to an express direction from the Board to

consider the appropriate interest rate to be used under the DCRR in its 2025 application. NS Power went on to submit that if it had not comprehensively addressed its position in the application, as directed, intervenors would not have had the chance to respond to that reasoning in their submissions and NS Power could be viewed as not having complied with the Board's directive. NS Power stated:

> NS Power files regulatory applications with the Board, many of which require reference and framing within a statutory or legal context. These are not court proceedings where the Rules of Evidence apply and there is a clear distinction between evidence (lay or expert) and argument/submissions. To the extent NS Power's applications require reference to legal principles or statutes and it does not sit a witness to respond to questions about those legal principles or statutes, NS Power trusts the Board will weigh any such "evidence" appropriately.
>
> All parties are free to argue against their use or interpretation in their written submissions. No party is deprived of an opportunity to do so and certainly no party is prejudiced by being made aware of that legal context at the earliest possible instance. Given this context, NS Power does not believe that general directions from the Board on the proper scope of evidence versus submissions is required.
>
> [NS Power Reply Submission, December 10, 2024, p. 8]

2.8.1 Findings

[63] The Board appreciates the concern raised by the Industrial Group but agrees that s. 4.1 of NS Power's application responded to a specific directive from the Board and provided parties in this proceeding with context for understanding NS Power's position on this point. This could also have been achieved by establishing a timeline for the proceeding that included an initial filing of submissions by NS Power before intervenors. This would obviously have extended the timeline for the proceeding, so the issue raised by the Industrial Group also touches upon the balance between regulatory process and regulatory efficiency, which must be considered in each set of circumstances presented to the Board.

[64] Ultimately, the Board strives to have efficient and fair processes. It will not be more likely to be swayed by legal argument given under the guise of evidence. This

should not, however, be taken as an invitation to disregard the distinction between evidence and argument. While additional context for evidence may sometimes be appropriate, the Board agrees with the Industrial Group that there has been an increasing trend towards including unnecessary argument in evidentiary filings.

[65] The Board declines to provide specific directions on this point at this time, but the parties should be aware that there may be consequences associated with raising legal arguments in evidence unnecessarily. For example, legal argument from consultants in expert reports could very well be viewed as a form of advocacy that could cause the Board to question the expert's neutrality and independence and discount their evidence.

3.0 SUMMARY OF BOARD FINDINGS

[66] This is the first year since NS Power's DCRR has been in effect that the BA charge has been proposed to be changed to account for variances between the PCR amount billed in 2023 and the actual cost of DSM during the same period. The Board finds that NS Power has not met the burden on it to demonstrate that the financing costs associated with the BA balances should be something other than the default interest rate under the *Public Utilities Act*.

[67] The Board approves the resetting of the DSM Rider, but the proposed BA charge must be adjusted to exclude all interest. NS Power is directed to update the DCRR charges in a compliance filing, to be filed no later than January 10, 2025. Following this decision, the Board will establish a generic proceeding to more thoroughly address and consider issues arising from the application of s. 64AB to deferral and variance accounts, including those discussed in this decision. The Board will provide more guidance,

including the possibility of establishing a formal rule for the assessment of interest. The Board's decision on the entitlement of NS Power and its customers to interest on BA balances from 2023 will be held in abeyance until these matters are more fully considered and may, if interest is determined to be payable, be included in future DCRR adjustments.

[68] An Order will issue following a satisfactory compliance filing.

DATED at Halifax, Nova Scotia, this 23rd day of December, 2024.

Stephen T. McGrath

Roland A. Deveau

Steven M. Murphy