

NOVA SCOTIA COURT OF APPEAL

Citation: *Port Hawkesbury Paper LP v. Nova Scotia (Energy Board)*, 2026 NSCA
29

Date: 20260408
Docket: CA 544150
Registry: Halifax

Between:

Port Hawkesbury Paper LP

Appellant

v.

Nova Scotia Energy Board, Nova Scotia Power Incorporated, Consumer Advocate,
Small Business Advocate,
Industrial Group, Efficiency One, Municipal Electric Utilities of Nova Scotia
Cooperative,
Nova Scotia Department of Energy, and Renewall Energy Inc.

Respondents

Judges: Farrar, Fichaud and Derrick, JJ.A.

Appeal Heard: March 10, 2026, in Halifax, Nova Scotia.

Facts and Procedural History: The supply of electricity in Nova Scotia is a near monopoly of the Respondent Nova Scotia Power Corporation (“NS Power”). Under provincial legislation, the Respondent Nova Scotia Energy Board (“Energy Board”), successor to the former Nova Scotia Utility and Review Board, sets rates by acting as a reasonable surrogate for competition. An aspect of reasonableness is equitable treatment among ratepayers.

The Maritime Link is a 500-megawatt capacity subsea cable that connects Newfoundland and Labrador to Nova

Scotia. A company affiliated with NS Power has paid for its design, construction and operation. It was built on schedule and on budget. The affiliated company assesses NS Power for the Maritime Link's costs. NS Power's rates, approved by the Energy Board, aim to recover the costs.

The Maritime Link delivers to Nova Scotia a contracted block of energy ("Nova Scotia Block") from the Muskrat Falls generating station in Newfoundland and Labrador. Delivery was to start in January 2018. However, delivery suffered significant delay on the Newfoundland and Labrador side. NS Power was required to procure more expensive replacement fuel, and its affiliate had to pay delay-related costs, resulting in a substantial deficit sourced with the Maritime Link.

To recover the deficit, NS Power sought assistance from the Governments of Canada and Nova Scotia. The outcome included a \$500 million loan guarantee by the Government of Canada. The terms of the guarantee appear in a contractual Term Sheet dated September 24, 2024, executed by the Governments of Canada and Nova Scotia, NS Power, its affiliated company and its shareholder ("2024 Term Sheet"). The 2024 Term Sheet provided NS Power would recover its Maritime Link costs from its ratepayers over the contracted delivery term of the Nova Scotia Block, *i.e.* 28 years to 2052. In late 2024 and early 2025, the Utility and Review Board issued decisions that approved the approach set out in the 2024 Term Sheet. These Decisions are not appealed.

The Appellant Port Hawkesbury Paper LP ("PH Paper") is a ratepayer to NS Power. PH Paper holds the view that the system of rates whereby NS Power will recover its costs for the Maritime Link treats PH Paper unfairly *vis-à-vis* other ratepayers. PH Paper applied to the Energy Board for a pre-emptive ruling that PH Paper's power rates would never include costs from the Maritime Link.

In the Decision under appeal, the Energy Board dismissed the application. (paras [1-5](#)).

Parties' Submissions:

- Appellant (PH Paper): Argued that the Energy Board erred in law by misinterpreting the 2024 Term Sheet allowing Maritime Link costs to be included in its rates, violating principles of inter-class equity and the rule against retroactive ratemaking (paras [45-46](#), [54](#), [69-70](#)).

- Respondents (Industrial Group, Consumer Advocate, Small Business Advocate, NS Power, Energy Board): Disputed PH Paper's submissions, arguing that the Energy Board's decision was in the public interest and aligned with regulatory principles (paras [47](#), [49-50](#)).

Legal Issues:

- Did the Energy Board err in law in finding that debt arising from the Fuel Adjustment Mechanism balance was eliminated by the arrangement prescribed in the 2024 Term Sheet?

- Did the Energy Board err in law or jurisdiction by incorrectly formulating, interpreting, and applying the principles of ratemaking?

Disposition:

- Appeal dismissed without costs.

Reasons:

- The Energy Board correctly interpreted the 2024 Term Sheet, which eliminated the existing Fuel Adjustment Mechanism balance and replaced it with a new debt structure, aligning costs with benefits over 28 years (paras [57-69](#)).

- The Board's decision did not violate principles of inter-class equity or retroactive ratemaking. PH Paper would only be responsible for Maritime Link costs if it moved to a tariff that included those costs, ensuring fairness among ratepayers (paras [90-94](#)).

- The Board's approach was consistent with statutory criteria and regulatory principles, ensuring rates were fair, just, and reasonable (paras [79-87](#)).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 97 paragraphs.

NOVA SCOTIA COURT OF APPEAL

Citation: *Port Hawkesbury Paper LP v. Nova Scotia (Energy Board)*, 2026 NSCA
29

Date: 20260408
Docket: CA 544150
Registry: Halifax

Between:

Port Hawkesbury Paper LP

Appellant

v.

Nova Scotia Energy Board, Nova Scotia Power Incorporated, Consumer Advocate,
Small Business Advocate,
Industrial Group, Efficiency One, Municipal Electric Utilities of Nova Scotia
Cooperative,
Nova Scotia Department of Energy, and Renewall Energy Inc.

Respondents

Judges: Farrar, Fichaud and Derrick, JJ.A.

Appeal Heard: March 10, 2026, in Halifax, Nova Scotia.

Held: Appeal dismissed without costs, per reasons for judgment of Fichaud J.A., Farrar and Derrick J.A. concurring

Counsel: Ian Dunbar and Melanie Gillis for the Appellant
Nancy Rubin, K.C., and Brianne Rudderham, for the Respondent Industrial Group
Michael Murphy and Melissa Pike for the Respondent Consumer Advocate
Melissa MacAdam and Rebekah Powell, for the Respondent Small Business Advocate
Jennifer Power for the Respondent Nova Scotia Power Incorporated
William Mahody, K.C., for the Respondent Nova Scotia Energy Board

The Respondents Efficiency One, Municipal Electric Utilities of Nova Scotia Cooperative, Renewall Energy Inc. and Attorney General of Nova Scotia (for the Nova Scotia Department of Energy) not participating

Reasons for judgment:

[1] The supply of electricity in Nova Scotia is a near monopoly of the Respondent Nova Scotia Power Corporation (“NS Power”). Under provincial legislation, the Respondent Nova Scotia Energy Board (“Energy Board”), successor to the former Nova Scotia Utility and Review Board, sets rates by acting as a reasonable surrogate for competition. An aspect of reasonableness is equitable treatment among ratepayers.

[2] The Maritime Link is a 500-megawatt capacity subsea cable that connects Newfoundland and Labrador to Nova Scotia. A company affiliated with NS Power has paid for its design, construction and operation. It was built on schedule and on budget. The affiliated company assesses NS Power for the Maritime Link’s costs. NS Power’s rates, approved by the Energy Board, aim to recover the costs.

[3] The Maritime Link delivers to Nova Scotia a contracted block of energy (“Nova Scotia Block”) from the Muskrat Falls generating station in Newfoundland and Labrador. Delivery was to start in January 2018. However, delivery suffered significant delay on the Newfoundland and Labrador side. NS Power was required to procure more expensive replacement fuel, and its affiliate had to pay delay-related costs, resulting in a substantial deficit sourced with the Maritime Link.

[4] To recover the deficit, NS Power sought assistance from the Governments of Canada and Nova Scotia. The outcome included a \$500 million loan guarantee by the Government of Canada. The terms of the guarantee appear in a contractual Term Sheet dated September 24, 2024, executed by the Governments of Canada and Nova Scotia, NS Power, its affiliated company and its shareholder (“2024 Term Sheet”). The 2024 Term Sheet provided NS Power would recover its Maritime Link costs from its ratepayers over the contracted delivery term of the Nova Scotia Block, *i.e.* 28 years to 2052. In late 2024 and early 2025, the Utility and Review Board issued decisions that approved the approach set out in the 2024 Term Sheet. These Decisions are not appealed.

[5] The Appellant Port Hawkesbury Paper LP (“PH Paper”) is a ratepayer to NS Power. PH Paper holds the view that the system of rates whereby NS Power will recover its costs for the Maritime Link treats PH Paper unfairly *vis-à-vis* other ratepayers. PH Paper applied to the Energy Board for a pre-emptive ruling that PH Paper’s power rates would never include costs from the Maritime Link. In the Decision under appeal, the Energy Board dismissed the application.

[6] PH Paper appeals to the Court of Appeal. The *Energy and Regulatory Boards Act*, SNS 2024, c. 2, s. 36(1), permits an appeal on an issue of jurisdiction or law. A threshold issue is whether the Energy Board erred in law in its interpretation of the 2024 Term Sheet. The ultimate issue is whether the Board erred in law in its application of the principles that govern equitable treatment among ratepayers.

Electricity Rates

[7] Most of NS Power's customers, other than PH Paper which I will discuss separately, pay electricity rates calculated as follows.

[8] Fuel and purchased power accounts for over 50% of NS Power's cost to provide electricity to Nova Scotians. When developing its rates, NS Power forecasts its fuel and purchased power costs, then uses the forecast to calculate its rates to customers for the upcoming period. However, the actual costs of fuel and purchased power end up varying, up or down, from the forecast costs. NS Power tracks the variance, then trues it up by applying it as a charge or credit to the following year's rates. The rate adjustment is the "Actual Balance or Balancing Adjustment" ("AA/BA Rider"). The "fuel adjustment mechanism" is "FAM" and it is applied to "FAM customers". The accumulated shortfall, *i.e.* the balance of NS Power's actual costs after subtracting forecast costs, is the "FAM balance".

[9] Rate-setting for electricity inhabits a world of acronyms which are vernacular among the initiated. I will use "rate adjustment" instead of "AA/BA Rider". Instead of "FAM", I will use "Fuel Adjustment Mechanism".

[10] PH Paper is not a Fuel Adjustment Mechanism customer and does not pay the rate adjustment charged under the Fuel Adjustment Mechanism process. PH Paper pays NS Power further to the Extra-Large Industrial Active Demand Control rate ("ELIADC" in NS Power terminology). I will call it PH Paper's "Extra-Large Industrial" tariff or rate. PH Paper is NS Power's only customer who pays the Extra-Large Industrial rate.

[11] The terms of the Extra-Large Industrial tariff were negotiated and agreed between PH Paper and NS Power and, in 2020, approved by the Utility and Review Board for a four-year term: *Nova Scotia Power Incorporated (Re)*, 2020 NSUARB 44. Since then, PH Paper has paid for power under this tariff. In 2023 and 2025, respectively, the tariff was extended to December 31, 2025, and December 31, 2026: *Nova Scotia Power Incorporated (Re)*, 2023 NSUARB 226,

and Energy Board Decision issued on September 22, 2025, in NSEB matter No. M12184.

[12] PH Paper's Extra-Large Industrial tariff acknowledges unique features of PH Paper's demand profile. PH Paper's load magnitude and capability to ramp its usage up or down enables NS Power to direct an increase or decrease in PH Paper's load. This gives NS Power flexibility to manage variable constraints on its electricity grid. In return, NS Power gives PH Paper a credit for "Active Demand Control".

[13] The Fuel Adjustment Mechanism apportions Maritime Link costs among members of a class numbering hundreds of thousands. In NS Power parlance, this means the resulting rates are "above-the-line" from the cost-of-service perspective ("ATL" in some of the documents). Under the Extra-Large Industrial tariff, PH Paper pays for fuel costs NS Power would not have incurred but for PH Paper's load, contributes to NS Power's fixed costs and shares the financial benefits from load-shifting. PH Paper's individually tailored tariff and rate are "below-the-line".

The Maritime Link Elevates the Fuel Adjustment Mechanism Balance

[14] The Maritime Link is a high voltage direct current subsea cable with a 500-megawatt capacity connecting Newfoundland and Labrador to Nova Scotia. It is established under the *Maritime Link Act*, SNS 2012, c. 9. The power comes from the Muskrat Falls Generating Station in Labrador via the Labrador-Island Link to the Granite Canal substation in Newfoundland, where it joins Maritime Link's undersea cable to the Woodbine substation in Nova Scotia.

[15] The Maritime Link is owned and operated by Nova Scotia Power Maritime Link Incorporated ("NSP Maritime Link"), abbreviated in the documents to "NSPML". NSP Maritime Link is a wholly owned subsidiary of Emera Inc., which is NS Power's shareholder, and is a designated public utility: *ML Cost of Recovery Process Regulations (ML Regulations)*, NS Reg. 189/2012. NSP Maritime Link has been responsible for the design, construction, operation and maintenance of the Maritime Link.

[16] The Maritime Link project was set out in 13 agreements dated July 31, 2012, between Emera Inc., Nalcor Energy (the responsible Crown corporation in Newfoundland and Labrador) and other parties. Under these agreements, NSP Maritime Link pays 20% of the capital and operating costs of the Lower Churchill Phase 1 and Maritime Link facilities in return for 20% of the estimated energy and

capacity from Muskrat Falls over a term of 35 years. The expected service life of the Maritime Link is 50 years. However, after 35 years, ownership of the Maritime Link facilities will transfer to Nalcor Energy. To compensate for the 15-year differential, Nalcor was to supply NSP Maritime Link with an additional block of energy in the first five years of the Maritime Link's operation. In 2013, the Utility and Review Board determined that the Maritime Link project represents the lowest long-term cost alternative for renewable electricity to Nova Scotians: *NSP Maritime Link Incorporated (Re)*, 2013 NSUARB 154.

[17] Each year, NS Maritime Link assesses NS Power for NSP Maritime Link's costs related to the Maritime Link. The Energy Board approves or revises the assessment, which NS Power recovers from its customers' rates. The rates also are subject to approval by the Energy Board.

[18] The Maritime Link's costs have always been the responsibility of NS Power's (above-the-line) Fuel Adjustment Mechanism ratepayers. PH Paper's (below-the-line) Extra-Large Industrial Tariff excludes Maritime Link's costs. PH Paper's rates would include costs for the Maritime Link only if PH Paper moves to an above-the-line tariff.

[19] The Maritime Link was supposed to start delivery of the Nova Scotia Block of energy by January 2018. Consequently, the Utility and Review Board approved NSP Maritime Link's initial assessment for Maritime Link costs (to be charged by NS Power to its Fuel Adjustment Mechanism customers) for January 2018: *NSP Maritime Link Incorporated (Re)*, 2017 NSUARB 149. Since 2018, an annual assessment for Maritime Link costs, as approved or revised by the Utility and Review Board, has been rendered by NSP Maritime Link to NS Power, to be paid by rates collected by NS Power from its Fuel Adjustment Mechanism customers.

[20] NSP Maritime Link completed construction of the Maritime Link on schedule and on budget.

[21] Unfortunately, the delivery of energy to the Maritime Link was beset with delays in Newfoundland and Labrador for the completion of the Muskrat Falls Generating Station and the Labrador-Island Link. In several rulings, the Utility and Review Board chronicled the project's choppy history and the bracing measures needed on the Nova Scotia side until the Maritime Link became fully operational: *Maritime Link Act (Re)*, 2019 NSUARB 156 and *NSP Maritime Link Incorporated (Re)*, 2022 NSUARB 18; *NSP Maritime Link Incorporated (Re)*, 2023 NSUARB 175.

[22] In the Decision under appeal, the Energy Board found:

Between January 1, 2018 and December 31, 2024, NS Power's FAM customers paid approximately \$1 billion in costs for the Maritime Link.

(2025 NSEB 2, para. 56).

[23] The Maritime Link's non-performance meant these customers did not receive what they paid for. Consequently, NS Power did not implement full annual true ups in its rates to Fuel Adjustment Mechanism customers. See 2017 NSUARB 149, paras. 118, 123, 126; 2023 NSUARB 175; 2025 NSEB 2, paras. 54-56.

[24] NS Power's forecast of fuel and purchased power between 2018 and 2024 assumed the Maritime Link energy would be delivered as planned. The under-performance required NS Power to procure replacement fuel and purchased power to replace the missing Maritime Link power. This was at a time when global fuel prices spiked. NSP Maritime Link's debt service for the Maritime Link's costs continued unabated, despite the non-delivery of electricity to the Maritime Link.

[25] As a result, from 2018 to 2024, NS Power accumulated a substantial Fuel Adjustment Mechanism negative balance, exceeding \$400 million by 2024 and mounting.

Addressing the Elevated Fuel Adjustment Mechanism Balance

[26] To deal with the swelling Fuel Adjustment Mechanism balance, NS Power sought assistance from the Governments of Canada and Nova Scotia.

[27] In 2024, a provincial Crown corporation, Invest Nova Scotia, purchased \$117 million of the balance, in return for recognition that its purchased debt would be amortized over no more than 10 years, to be collected from Fuel Adjustment Mechanism customers. The Utility and Review Board approved the arrangement: *Nova Scotia Power Incorporated (Re)*, 2024 NSUARB 71.

[28] Most of the Fuel Adjustment Mechanism balance remained. Negotiations with the federal government proceeded. The outcome was an agreement, represented by the 2024 Term Sheet. The 2024 Term Sheet set out the terms for a \$500 million loan guarantee by the Government of Canada. The documents call the guarantee "ML FLG2". The abbreviation distinguishes it from "ML FLG1", which was the federal government's initial loan guarantee of November 2012 at the outset

of the Maritime Link project (see *NSP Maritime Link Incorporated (Re)*, 2013 NSUARB 154, para. 69).

[29] The 2024 federal loan guarantee enabled NSP Maritime Link to issue a bond, with a manageable interest rate, for borrowings that would pay out the Fuel Adjustment Mechanism balance and amortize the new debt over the productive life of the Maritime Link.

[30] The 2024 Term Sheet was a contract executed on September 24, 2024, by the Governments of Canada and Nova Scotia, NSP Maritime Link, NS Power and Emera Inc. The Minister of Energy and Natural Resources of Canada and the Minister of Natural Resources and Renewables of Nova Scotia signed on behalf of the Governments of Canada and Nova Scotia. The 2024 Term Sheet included:

AGREEMENT PROVIDING THE KEY TERMS AND CONDITIONS FOR THE ADDITIONAL FEDERAL LOAN GUARANTEE BY HIS MAJESTY THE KING IN RIGHT OF CANADA FOR THE MARITIME LINK

... This agreement (this “Agreement”), which is being entered into at the request of the Government of NS (the “NS Crown”) so as to mitigate the increased costs incurred in NS which are directly attributable to the delays encountered by the NL Projects and, therefore, works in conjunction with the NL AIP. This Agreement sets forth the key terms and conditions of an additional Federal Loan Guarantee (“ML FLG2”) to guarantee \$500 million of newly issued third party debt (“ML FLG 2 Debt”). It is Canada’s expectation that the proceeds of the ML FLG2 Debt shall be used for the purposes previously conveyed by the NS Crown to Canada (which are summarized in Section 3.2 below).

...

At the request of the NS Crown, Canada hereby agrees to guarantee the ML FLG2 Debt and to provide the ML FLG2 as more fully described and subject to the key terms and conditions described herein.

...

TERMS AND CONDITIONS

...

3. ML FLG2 TERMS

...

3.2 Use of Proceeds

In accordance with Canada’s understanding of the intentions of NS Crown and NSP, the proceeds of the ML FLG2 Debt shall (i) first, be used by NSPML to

cover financing fees, (ii) second, be used by NSPML to refund to NSP for the ratepayer account the principal and interest payments associated with the ML FLG Debt made from June 1, 2018 to December 1, 2024, totalling \$485,900,000 and (iii) third, be used by NSPML to refund to NSP to partly cover the principal and interest payment scheduled for June 1, 2025 with respect to the ML FLG Debt. The refunded amounts would be used by NSP to defray the Fuel Adjustment Mechanism deficit, which is largely a result of unanticipated costs arising from the delays and deficiencies in the electricity contracted to be delivered by Nalcor Energy to NS (which are directly attributable to the NL Projects).

The funds received by NSP pursuant to the repayment of the Fuel Adjustment Mechanism deficit may only be used by NSP to reduce its indebtedness.

3.3 Term of the ML FLG2

The term of the ML FLG2 shall begin on the ML FLG2 Close Date and shall terminate on the earlier of: (a) payment in full of the ML FLG2 Debt; or (b) December 1, 2052.

3.4 ML FLG2 Amortization Profile

The ML FLG2 Debt shall be repaid in accordance with straight-line amortization (i.e. the amount applied against payment of the principal portion of the ML FLG2 Debt shall remain constant with each payment) over a term commencing on the ML FLG2 Close Date and ending on December 1, 2052 (“the ML FLG2 Amortization Profile”).

...

[31] Articles 3.2 and 3.4 are the focus of this litigation.

[32] The 28-year term (2024 to 2052) for repayment and amortization, prescribed in Articles 3.3 and 3.4, matched: (1) the Maritime Link’s expectancy as a productive asset of NSP Maritime Link, before the asset would be transferred to Nalcor Energy, (2) the contracted delivery term of the Nova Scotia Block, (3) the amortization profile used for the federal government’s earlier federal loan guarantee, and (4) the term of depreciation for NSP Maritime Link’s assets recommended by expert evidence and approved by the Utility and Review Board (*NSP Maritime Link Incorporated (Re)*, 2013 NSUARB 154; *NSP Maritime Link Incorporated (Re)*, 2022 NSUARB 18, paras. 79-85; *NSP Maritime Link Incorporated (Re)*, 2024 NSUARB 199, para. 78).

[33] The 28-year term of amortization also matched costs to ratepayers with the benefits to be received by those ratepayers, both scheduled to end in 2052. In the Decision under appeal (2025 NSEB 2, para. 56), the Energy Board said “the refund

arrangement results in far superior matching of costs and benefits of the Maritime Link than what existed before”.

Implementation of the 2024 Term Sheet

[34] In late 2024 and early 2025, the former Utility and Review Board issued two decisions that implemented the 2024 Term Sheet’s provisions.

[35] In *NSP Maritime Link Incorporated (Re)*, 2024 NSUARB 199 (“2024 Assessment Decision”), dated November 29, 2024, the Utility and Review Board approved NSP Maritime Link’s cost assessment to be recovered from NS Power for 2025. The Board found the refund arrangement, prescribed by Article 3.2 of the 2024 Term Sheet, was “in the public interest”. The Board considered the “intergenerational equity concerns about future customers having to pay recent fuel costs”. To this concern, the Board said the outcome would appropriately re-align costs to customers who would receive the benefit during the Maritime Link’s useful life. The Board’s reasons explained:

[4] On September 25, 2024, NSPML applied to the Board for a supplemental assessment of \$42.4 million, in addition to the initial application for \$158.2 million, which would result in a revised total cost assessment of \$200.6 million against NS Power.

[5] This subsequent application to amend the total cost assessment resulted from a commercial arrangement proposed by NS Power and NSPML to take advantage of relief secured by these utilities from the Government of Canada. This would see NSPML issue \$500 million of new debt supported by a Federal Loan Guarantee (FLG). NSPML would then refund the \$500 million (less financing fees) to NS Power to be applied against its Fuel Adjustment Mechanism (FAM) balance, which is expected to reach about \$412 million by December 31, 2024.

[6] The \$42.4 million supplemental assessment is for the first year of the repayment of the amortized debt by NSPML, which is to be recovered from NS Power’s ratepayers. The debt will be paid by NSPML (and recovered by NSPML from NS Power’s ratepayers) over 28 years (until 2052). The \$42.4 million supplemental assessment will cause an overall average increase of about 2.4% on power rates for NS Power’s residential customers.

...

[65] ... Going forward, it is proposed that each year until 2052, NS Power will pay NSPML 1/28 of the \$500 million (plus financing and guarantee costs) through NSPML’s annual cost assessment to NS Power recovered from ratepayers for the Maritime Link.

...

[77] However, it could be argued that financing the deferral of fuel costs over 28 years, albeit at lower debt financing costs than WACC, raises intergenerational equity concerns about future customers having to pay recent fuel costs. NS Power said that because principal and interest expenses for repayment of the project costs will be deferred to the future, the costs will be matched to the customers who will ultimately benefit from Maritime Link energy. The Intervenors accepted this explanation and did not have any intergenerational equity concerns.

[78] Various aspects of the commercial arrangement between the utilities and the Government of Canada are not open to further negotiation or discussion, and cannot be amended by the Board. Two important features of the proposal are the 28-year term for repayment of NSPML's new \$500 million debt and the annual 0.5% Guarantee Fee required by the Federal Government. Over the 28-year term, the Guarantee Fee is projected to total \$33,750,000, which will ultimately be paid by customers. The 28-year term is also fixed and intended to match the term of the original FLG for the Maritime Link project, both ending December 1, 2052. NS Power said in closing submissions that this 28-year term will facilitate the bond offering to the investment market. This term was selected to mitigate the rate impacts on customers who otherwise would have faced significant rate increases if the unrecovered FAM AA/BA balance of about \$412 million by December 31, 2024 was paid over the short-term as required under the FAM Plan of Administration. Instead of facing an immediate average rate increase of 19.2% on January 1, 2025, the proposal will result in an average 2.4% rate increase, although the new debt will be amortized over 28 years.

...

[81] Having reviewed the evidence and the submissions, the Board is satisfied that the proposal will benefit customers by mitigating the potentially significant rate pressures in the near term that would otherwise occur absent this commercial arrangement. Further, the proposal will directly benefit NS Power by improving its credit metrics. The utility's lower borrowing costs will also indirectly benefit customers as NS Power seeks significant capital investment for projects that are needed to meet its legislated climate and environmental requirements. The Board concludes that approving the application is in the public interest. Accordingly, the Board approves the following:

- Creation of a \$500 million regulatory asset

...

[36] The 2024 Assessment Decision addressed NSP Maritime Link's assessment to NS Power but did not prescribe NS Power's rates to customers. In *Nova Scotia Power Incorporated (Re)*, 2025 NSUARB 33, ("2025 Allocation Decision"), dated February 18, 2025, the Utility and Review Board determined

how Article 3.2 of the 2024 Term Sheet would impact customers' rates for 2025. The Board's reasons included:

[3] On September 25, 2024, NS Power applied for its 2025 FAM AA/BA Rider. NS Power's application was filed concurrently with an application by NSP Maritime Link Incorporated (NSPML) for approval of a supplemental assessment of \$42.4 million recoverable from NS Power. ... NSPML's assessments are recovered from NS Power's customers as a fuel cost through FAM.

...

[5] In November 2024, the Board approved NSPML's application for its revised total cost assessment of \$200.6 million, including the \$42.4 million supplemental assessment. The supplemental assessment would result in an overall average power rate increase of about 2.4% for NS Power's residential customers, assuming an effective date of January 1, 2025. NS Power proposed collecting the 2025 supplemental assessment through the 2025 FAM AA Rider.

[6] Based on the evidence and submissions, the Board approves the proposed 2025 FAM AA/BA Rider, effective February 18, 2025, which reflects the approximate 2.4% overall average increase for NS Power's residential customers from NSPML's \$42.4 million supplemental assessment.

...

3.0 ANALYSIS

3.1 Allocation of NSP Maritime Link Refund

[17] The Term Sheet for the new \$500 million FLG2 contemplates that the funds from the guaranteed loan would be used by NSPML to refund NS Power for past principal and interest payments associated with the financing of the Maritime Link under the original FLG1 for that project:

[quotation of article 3.2 of the 2024 Term Sheet omitted]

[18] The refund must be "for the ratepayer account". NS Power proposes to allocate the refund to its various rate classes based on their proportionate share of the principal and interest payments associated with the FLG1 from January 2018 to September 2023. Class responsibility for those payments followed NS Power's approved cost-of-service methodology and FAM Plan of Administration.

...

3.1.1 Findings

[30] The Board finds that NS Power's allocation of the refund is appropriate. The refund is limited to the portion of NSPML annual assessments related to principal and interest payments associated with the existing FLG1 for the Maritime Link and, as noted by NS Power in its response to NSUARB IR-8, this was a requirement of the Federal Government in providing FLG2. The Term

Sheet for the new loan guarantee explicitly notes that Canada expects that the proceeds from the FLG2 loan will be used for the purposes summarized in s. 3.2 of the Term Sheet. This provision, quoted earlier in this decision, requires that the proceeds of the new federally guaranteed loan be used as follows, in order:

1. The payment of NSPML’s financing fees;
2. A refund by NSPML to NS Power “for the ratepayer account the principal and interest payments associated with the [FLG1 debt] made from June 1, 2018 to December 1, 2024, totalling \$485,900,000; and
3. A refund by NSPML to NS Power to “partly cover the principal and interest payments scheduled for June 1, 2025, with respect to [the FLG1 debt]”

...

4.0 Conclusion

...

[67] The funds from the FLG2 loan to be refunded to NS Power for the account of its customers will be allocated as proposed by NS Power, except that the calculation of the FLG2 debt costs used as the basis for allocating the refund must use the period from January 2018 to December 2024. This must be accounted for in NS Power’s 2026 FAM AA/BA adjustments.

[37] The Utility and Review Board’s order of February 18, 2025, implemented the Allocation Decision by ordering:

The Board orders that:

1. NS Power’s 2025 FAM AA/BA Rider is approved, effective February 18, 2025, and attached as Schedule A.

...

3. NS Power is directed to calculate and allocate the Maritime Link refund to customer classes as outlined in the Board’s decision.

...

[38] Neither the 2024 Assessment Decision nor the 2025 Allocation Decision has been appealed.

The Energy Board’s Decision Under Appeal

[39] On December 5, 2024, PH Paper filed with the Utility and Review Board:

Notice of Application by PHP seeking confirmation that it will not be responsible for the repayment of any of the costs associated with NS Power’s \$500 million regulatory asset as part of the tolls, rates and charges PHP pays to NS Power, having fully paid its fuel and purchased power costs.

[40] The *Energy and Regulatory Boards Act*, proclaimed on April 1, 2025, ss. 3 and 4, continued the former Utility and Review Board as the “Energy and Regulatory Boards Tribunal” and established the “Nova Scotia Energy Board” as “a division of the Tribunal”. The Energy Board is the Utility and Review Board’s successor for applications under the *Public Utilities Act*, RSNS 1989, c. 380, the *Electricity Act*, SNS 2004, c. 25 and the *More Access to Energy Act*, SNS 2024, c. 2, Sch. B. The transition is prescribed by ss. 41 and 43 of the *Energy and Regulatory Boards Act*.

[41] PH Paper’s application proceeded before the Energy Board.

[42] PH Paper’s theory was:

- The 2024 Term Sheet rescheduled or refinanced the obligations of Fuel Adjustment Mechanism customers from 2018-2024.
- PH Paper had fully paid its rates for 2018-2024 under its Extra-Large Industrial tariff.
- Hence, PH Paper should never owe any amount of the Fuel Adjustment Mechanism’s rescheduled balance from 2018 to 2024. To charge PH Paper for outstanding rates attributable to 2018-2024 would offend the rate-setting principles that support equity among ratepayers and prohibit retroactive rates.

[43] The Energy Board, by a three-person panel, heard PH Paper’s application and issued a Decision on April 30, 2025 (2025 NSEB 2 - M12004 and M11902). The Board dismissed the application.

[44] In the Introduction to its 30-page Decision, the Energy Board summarized its reasoning:

[1] In the fall of 2024, the Government of Canada agreed to guarantee a \$500 million bond issuance by NSP Maritime Link Inc (NSPML). Under the arrangement, NSPML had to use proceeds of a bond issuance to refund Nova Scotia Power Incorporated, on behalf of its customers, amounts paid (or expected to be paid) between 2018-2025 for principal and interest for an existing federally

guaranteed bond issuance used to finance the construction of the Maritime Link. At the time of this arrangement, fuel and purchased power costs, which NS Power recovers under a Fuel Adjustment Mechanism (FAM), were chronically and significantly under-recovered. The effect of the arrangement was to reduce the FAM balance, strengthening NS Power's financial position without needing a significant increase in rates for FAM customers to do so.

[2] The Nova Scotia Utility and Review Board (NSUARB) found this arrangement to be in the public interest and approved it. The NSUARB also approved the creation of a regulatory asset by NSPML, through which NSPML could recover its costs under the new federally guaranteed debt and, therefore, fully recover its investment in the Maritime Link. Under the arrangement with the Federal Government, the new federally guaranteed debt must be paid over the remaining term of the original financing for the Maritime Link (the next 28 years). The recovery of these Maritime Link costs over the next 28 years better matched those payments with the benefits of the Maritime Link, which, as discussed in numerous NSUARB decisions, has seriously underperformed in its initial years of operation.

[3] Port Hawkesbury Paper LP (PHP) is not a FAM customer and was not obliged to repay any outstanding fuel balance that existed when the arrangement with the Federal Government was concluded. In this proceeding, PHP asked the NSUARB to confirm that it will not be responsible for the repayment of the costs associated with the \$500 million regulatory asset as part of the tolls, rates and charges PHP pays to NS Power in the future.

...

[5] A foundational premise for PHP's request is that, as a non-FAM customer, it is inappropriate for PHP to repay fuel and purchased power costs incurred by NS Power to serve FAM customers. While the Board is mindful of the cost-of-service principle that underlies this position, it disagrees with PHP's premise in this case. The Term Sheet for the arrangement required the funds from the guaranteed debt to be used by NSPML to refund NS Power for past (and some prospective) principal and interest payments associated with the financing of the Maritime Link under an existing federally guaranteed debt. Because of the refund, the previously incurred costs were eliminated.

[6] Further, the Board finds that the recovery of payments relating to NSPML's approved \$500 million regulatory asset from NS Power's customers over the next 28 years, whether they be existing customers now, new customers or PHP, match the costs of the Maritime Link with its benefits much better than was previously the case because of issues with historical non-delivery and under-delivery of energy over the Maritime Link. As a result, the Board finds that any future payments related to the regulatory asset are more appropriately associated with future service from the Maritime Link and are better characterized as costs incurred to provide service at that time, rather than as recovery of historically incurred costs.

[7] As a result, the Board declines to confirm that PHP will not be responsible for the repayment of any of the costs associated with the \$500 million regulatory asset as part of the tolls, rates and charges PHP pays to NS Power. PHP will be responsible for those payments if it takes service under a tariff that covers those costs.

Issues on Appeal

[45] On June 5, 2025, PH Paper filed a Notice of Appeal to the Court of Appeal. The Notice appealed from the Energy Board's Decision of April 30, 2025.

[46] PH Paper advanced two issues:

First Issue: Did the Energy Board err in law in finding that debt arising from the Fuel Adjustment Mechanism balance was eliminated by the arrangement prescribed in the 2024 Term Sheet?

Second issue: Did the Energy Board err in law or jurisdiction by incorrectly formulating, interpreting, and applying the principles of ratemaking?

[47] The Respondents Industrial Group, Consumer Advocate, Small Business Advocate, NS Power and Energy Board filed factums and participated at the hearing in this Court. The Energy Board's submission was explanatory. The others disputed all, or aspects of PH Paper's submissions. The Respondents Efficiency One, Municipal Electric Utilities of Nova Scotia, Renewall Energy Inc. and the Nova Scotia Department of Energy (*i.e.* the Attorney General) did not participate.

Standard of Review

[48] PH Paper's appeal is brought under s. 36 of the *Energy and Regulatory Boards Act*:

Appeal

36(1) An appeal lies to the Court of Appeal from an order of a Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within 30 days after the issuance of the order.

[49] PH Paper's Notice sought leave to appeal. Section 36(1) does not require leave.

[50] The *Energy and Regulatory Boards Act* prescribes the effect of the Energy Board’s findings of fact:

Questions of fact

...

31(3) The finding or determination of a Board upon a question of fact within its jurisdiction is binding and conclusive.

[51] Under ss. 31(3) and 36(1), PH Paper’s appeal is confined to alleged errors of law and jurisdiction. Alleged errors of fact are not appealable: *Tri-C Management Limited v. Nova Scotia (Attorney General)*, 2021 NSCA 26 [leave to appeal denied, October 21, 2021, case # 39678 (SCC)], at paras. 39 and 63, per Bourgeois J.A. for the Court.

[52] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 10, the majority’s reasons said the standard of review analysis begins with a presumption of reasonableness, from which the reviewing court may derogate “only where required by a clear indication of legislative intent or by the rule of law”.

[53] Section 36(1) permits PH Paper to “appeal”. A statutory directive that the proceeding be an “appeal” signals the legislature intended the appellate standard: *Vavilov*, para. 44; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, paras. 4 and 34; *Gannett v. Halifax Regional Centre for Education*, 2026 NSCA 16, para. 80.

[54] For issues of law, the appellate standard is correctness.

[55] Correctness applies also to legal points that are extractable from issues of mixed fact and law, as explained by Justices Iacobucci and Major for the majority in *Housen v. Nikolaisen*, 2002 SCC 33:

36. To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this

reason that these matters are referred to as questions of “mixed law and fact”. Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises, supra*, is that, where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[56] To similar effect: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, para. 39; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, paras. 43-45.

First Issue – Did the 2024 Term Sheet “Eliminate” the Existing Debt?

[57] The Energy Board found that the 2024 Term Sheet eliminated the existing Fuel Adjustment Mechanism balance and, to repay the new debt, substituted straight-line amortizing payments over the Maritime Link’s remaining delivery term of 28 years. Consequently, the debt would be repaid by above-the-line (Fuel Adjustment Mechanism) ratepayers between 2024 and 2052, instead of by above-the-line (Fuel Adjustment Mechanism) ratepayers from 2018 to 2024.

[58] In this respect, the Board’s reasons included:

[57] The Board finds the refund eliminated the existing debt. The recovery of the refunded principal and interest payments for the Maritime Link have [*sic*] been shifted in time to better match costs and benefits over the next 28 years. Therefore, any future payments by PHP associated with NSPML’s recently approved regulatory asset for the new federally guaranteed debt are not payments for costs incurred by other customers, but are payments for the cost of using the Maritime Link at that point in time. In this regard, PHP would be in the same situation as new customers who join the system in the future.

...

[67] As discussed, principal and interest payments associated with the Maritime Link, including those charged to FAM customers between 2020-2022, were refunded. They no longer exist and there is no obligation on any customer to pay them. Specifically, the “historical under-recovered fuel costs on account of 2020-2022” have been eliminated. ...

[59] PH Paper’s factum, para. 71, submits “the NSEB erred in law in finding that the underlying debt obligation arising from the FAM Balance was extinguished, instead of altered or restructured”. PH Paper, para. 2, says the Energy Board’s finding promotes form over substance.

[60] I respectfully disagree.

[61] The issue is whether the Energy Board erred in law. The arrangement derived from the Term Sheet, an executed written contract. Contractual interpretation is governed by legal principles.

[62] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, Justice Rothstein for the Court set out the modern approach to contractual interpretation:

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. **The overriding concern is to determine “the intent of the parties and the scope of their understanding” [citations omitted]. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.**

...

...

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement [citations omitted]. The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract [citation omitted]. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [citation omitted].

[bolding added]

[63] Article 3.2 of the Term Sheet says the proceeds:

shall ... (ii) second, be used by NSPML to refund to NSP for the ratepayer account the principal and interest payments associated with the ML FLG Debt made June 1, 2018 to December 1, 2024, totalling \$485,900,000 The refunded amounts would be used by NSP to defray the Fuel Adjustment Mechanism deficit, which is largely a result of unanticipated costs arising from delays and deficiencies in the electricity contracted to be delivered by Nalcor Energy to NS (which are directly attributable to the delays encountered by the NL Projects).

The funds received by NSP pursuant to the repayment of the Fuel Adjustment Mechanism deficit **may only be used by NSP to reduce indebtedness.**

[bolding added]

[64] Then, Article 3.4 says the debt “**shall be repaid** in accordance with straight-line depreciation ... commencing on the ML FLG2 Close Date and **ending on December 1, 2052 ...**” [bolding added]

[65] The “ordinary and grammatical meaning” of Articles 3.2 and 3.4 is:

- The proceeds were a “refund to NSP for the ratepayer account” to “defray the Fuel Adjustment Mechanism deficit” for the “Debt ... totaling \$485,900,000”. The refund would extinguish the debt formerly owing by Fuel Adjustment Mechanism customers.
- The new debt would be amortized by payments from ratepayers between 2024 to 2052.

[66] The surrounding circumstances confirm this interpretation:

- The introduction to the 2024 Term Sheet recites the precipitating circumstances, known to the parties:

The NL Projects encountered significant delays and cost overruns during construction which resulted in a material increase to the overall costs of the Lower Churchill Projects incurred by the Province of Newfoundland and Labrador (“NL”) and the Province of Nova Scotia (“NS”). The increased costs incurred by NL were mitigated pursuant to an agreement in principle dated July 28, 2021 (“the NL AIP”) between Canada and the Government of NL (“the NL Crown”) and the definitive documentation entered into pursuant to the NL AIP. **This Agreement** (this “Agreement”), **which is being entered into at the request of the Government of NS** (the “NS Crown”) so as to mitigate the increased costs incurred by NS which are directly attributable to the delays encountered by the NL Projects and, therefore, works in conjunction with the NL AIP. This Agreement sets forth a summary of the key terms and conditions of an additional Federal Loan Guarantee (“ML FLG2”) to guarantee \$500 million of newly issued third party debt (“ML FLG2 Debt”). **It is Canada’s expectation that the proceeds of the ML FLG2 Debt shall be used for the purposes previously conveyed by the NS Crown to Canada (which are summarized in Section 3.2 below).**

[bolding added]

- The amortized payments over 28 years served to “match the costs of the Maritime Link with its benefits much better than was previously the case” (Energy Board’s Decision under appeal, paras. 6, 55-56, and 68; see above, para. 33). The approach is consistent with the regulatory principle that rates to recover costs should match the timing of the associated benefits.
- The amortization profile matched the term of depreciation the Utility and Review Board had approved, based on expert evidence, for the assets of NSP Maritime Link (*NSP Maritime Link Incorporated (Re)*, 2022 NSUARB 18, paras. 79-85), and that used for the initial federal loan guarantee (ML FLG1) in 2012-13. (2024 Assessment Decision, para. 78; see above, para. 30)
- The amortization profile is consistent with the projected 35-year term for the delivery of the Nova Scotia Block of energy from 2017 to 2052. (*NSP Maritime Link Incorporated (Re)*, 2013 NSUARB 154, paras. 309, 338, 366, 372, 380, 393. See above, para. 16.)

[67] The 2024 Term Sheet did not change the classes of NS Power customers whose rates would pay for the Maritime Link costs. The newly amortized payments for 2024-2052 would continue to be included in the rates of NS Power’s Fuel Adjustment Mechanism (“above-the-line”) customers as before. The Maritime Link’s costs would not be included in the rate of a customer, *e.g.* PH Paper, who is subject to a “below-the-line” tariff such as PH Paper’s Extra-Large Industrial tariff.

[68] In short, the contracting parties’ intent, objectively manifested, was to (1) extinguish the debt accumulated to December 1, 2024 that was chargeable by NS Power to its Fuel Adjustment Mechanism ratepayers at that time, and (2) replace it with a new debt chargeable to the same above-the-line class of ratepayers who would benefit from the Maritime Link from 2024 to 2052.

[69] This was neither “form over substance”, as PH Paper submits, nor an artifice to extract rates from exempt ratepayers. Rather, it was an advertent initiative “to better match costs and benefits” for the productive life of the asset, facilitate a bond offering to satisfy an unexpected and potentially crippling debt-load, and reduce NS Power’s borrowing costs for this and other important projects. The Energy Board held this to be in the “public interest” (2024 Assessment Decision, paras. 78 and 81, and Decision under appeal, para. 2), a finding which is justified.

[70] PH Paper's interpretation deviates from the contractual intention, contrary to the directive in *Sattva*, para. 57. I would dismiss this ground of appeal.

Second Issue - Ratemaking Principles

[71] PH Paper's factum submits:

44. PHP says the NSEB failed to correctly formulate, interpret and apply the principles of ratemaking in deciding that PHP could be required to make payments toward the restructured FAM balance debt under a future rate. The specific errors committed by the NSEB in this regard are as follows: a) it failed to consider the inter-class equity factors raised by PHP; and b) it failed to align its decision with the rule against retroactive ratemaking.

[72] **Extractable issue of law:** Under s. 36(1) of the *Energy and Regulatory Boards Act*, the issue is whether the Energy Board erred in law. It is not this Court's function to re-weigh the factual ingredients of an issue of mixed fact and law. At the outset, it is necessary to separate the extractable legal principles at play from the sundry factors whose impact on the balance will vary, in the Board's evaluation, with the circumstances of each case. The Board's attribution of weight to the latter is not an extractable point of law.

[73] What are the legal constraints on the Energy Board's powers?

[74] The Energy Board's rate-setting is governed by the *Energy and Regulatory Boards Act* and the *Public Utilities Act*.

[75] Section 5 of the *Energy and Regulatory Boards Act* assigns the Energy Board's powers and duties:

NOVA SCOTIA ENERGY BOARD

...

Powers and duties

5(1) The Energy Board has those functions, **powers and duties that are conferred** or imposed upon it

(a) by **this Act**;

...

(c) respecting the production, transmission, delivery or furnishing of electrical energy for the purpose of heat, light and power or steam heat,

geothermal heat, geothermal resources and electricity efficiency and conservation, **by the *Public Utilities Act***;

...

[bolding added]

[76] The *Energy and Regulatory Boards Act* directs the following for rate-setting:

Approving and fixing rates, regulatory powers

6(1) In approving or fixing just and reasonable rates, tolls, charges or tariffs pursuant to this Act or any other enactment, **the Energy Board may adopt any method or technique that it considers appropriate**, including an alternative form of regulation.

(2) In approving or fixing rates, tolls, charges, tariffs, capital applications and all other matters over which the Energy Board has authority, **the Board shall give appropriate consideration** to the extent to which such rates, tolls, charges, tariffs, capital applications or other matters

(a) support competition and innovation in the provision of energy resources in the Province;

(b) support the development of a competitive electricity market;

(c) ensure the provision of safe, secure, reliable and economical energy supply in the Province;

(d) support sustainable development and sustainable prosperity; and

(e) support such other factors as prescribed by the regulations,

with the goal of approving rates, tolls, charges, tariffs, capital applications or other matters that are **consistent with the purpose of this Act**, the *More Access to Energy Act* and the regulations.

...

(6) The Energy Board shall endeavour to issue **fair decisions** in relation to all matters in a manner that is efficient, effective and as timely as possible.

[bolding added]

[77] The *Public Utilities Act*, cited above in s. 5(1)(c), outlines the Energy Board's powers to establish fair, just, reasonable and non-discriminatory rates, further to the following provisions:

Interpretation

2 In this Act,

...

- (a) “Board” means the Energy Board or the Regulatory Board, as the context requires;

...

- (e) “public utility” includes any person that may now or hereafter own, operate, manage or control

...

- (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.

...

Orders by Board respecting rates and charges of utility

- 44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor.

Amount utility entitled to earn annually

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

...

Duty to furnish safe and adequate service

- 52 Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

...

Equal rates and charges for similar services

- 67(1) All tolls, rates and charges **shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate**, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

...

Unjust or unreasonable rate or charge, regulation or service or action

- 87(1) If upon any investigation the rates, tolls, charges or schedules are found to be **unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this Act**, the Board shall have power to cancel such rates, tolls, charges or schedules, and declare null and void all contracts or agreements in writing or otherwise, to pay or touching the same, upon and after a day to be named by the Board, and to determine and by order fix, and order substituted therefor, such rate or rates, tolls or schedules a shall be just and reasonable.

...

Offence and penalty for unjust discrimination

- 107 If any public utility or any agent or officer thereof shall directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than that prescribed in the public schedules or tariffs then in force or established, as provided by this Act, or than it charges, demands, collects or receives from any other person, firm or corporation other than one conducting a business for a like and contemporaneous service, such public utility shall be deemed guilty of **unjust discrimination, which is** hereby prohibited and **declared unlawful**, and upon conviction shall be liable to a penalty

...

...

Undue or unreasonable preference

- 109(1) If any public utility shall knowingly or wilfully make or give an undue or **unreasonable preference or advantage** to any particular person, firm or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect

whatsoever, such public utility shall be deemed guilty of **unjust discrimination, which is hereby prohibited and declared unlawful.**

...

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.

[bolding added]

[78] The seminal authority in Nova Scotia on ratemaking for public utilities is *Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (S.C.A.D.). In response to a stated case, Chief Justice MacKeigan for the Court described the objects and components of a just and reasonable rate under the *Public Utilities Act*, RSNS 1967, c. 258:

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.

...

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”.

...

27 The “propriety” of the rates involves not only the propriety of their overall 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*. The latter aspect of its duty is imposed by the various provisions prohibiting unjust discrimination and requiring equal rates in substantially similar circumstances.**

[bolding added]

[79] In summary, when setting rates, the Energy Board’s legal responsibility is to: (1) act as it “considers appropriate” to implement the statutory criteria in accordance with the purpose of the legislation, under the *Energy and Regulatory Boards Act*, s. 6; and (2) ensure that rates are “fair, just and reasonable” both as a whole adjudged by rate base return, and without unreasonable preference or discrimination between customers in substantially similar circumstances, under the *Public Utilities Act*.

[80] From this legal platform, the Board has the discretion to balance ratemaking factors, whose weight will vary with the circumstances. In *Nova Scotia Power Inc. (Re)*, 2023 NSUARB 12, the former Utility and Review Board quoted a list of common factors:

[40] In exercising its ratemaking function, following the statutory requirements and mindful of the purposes of the legislation, the Board is also guided by the following long-established, fundamental ratemaking principles, which it noted in its decision for NS Power’s rate application in 2002 [2002 NSUARB 59, paras. 21-23] and a number of rate applications since:

[21] In utility regulation, there are generally accepted principles which govern the rate-making exercise. The object of rate-making under a cost-of-service-based model is that, to the extent reasonably possible, rates should reflect the cost to the utility of providing electric service to each distinct customer class. In regulating NSPI, the Board is guided by these generally accepted principles as well as by case law.

[22] A widely-accepted publication written by Dr. James Bonbright entitled *Principles of Public Utility Rates*, sets out the following guidelines for determining appropriate rates:

CRITERIA OF A SOUND RATE STRUCTURE

1. The related, “practical” attributes of simplicity, understandability, public acceptability, and feasibility of application.

2. Freedom from controversies as to proper interpretation.
3. Effectiveness in yielding total revenue requirements under the fair-return standard.
4. Revenue stability from year to year.
5. Stability of the rates themselves, with a minimum of unexpected changes seriously adverse to existing customers. (Compare “The best tax is an old tax.”)
6. Fairness of the specific rates in the apportionment of total cost of service among the different customers.
7. Avoidance of “undue discrimination” in rate relationships.
8. Efficiency of the rate classes and rate blocks in discouraging wasteful use of service while promoting all justified types and amounts of use:
 - a) in the control of the total amounts of service supplied by the company;
 - b) in the control of the relative uses of alternative types of service (on-peak versus off-peak electricity, Pullman travel versus coach travel, single-party telephone service versus service from a multi-party line, etc.).

(Exhibit N-92) (James Bonbright, *Principles of Public Utility Rates*, Columbia University Press, 1961, p. 291).

[23] These principles are well established and form the background against which the current application must be assessed.

[41] The Board continues to make its decisions in accordance with the PUA and the principles noted above.

[81] PH Paper cites this passage and submits the Energy Board erred in law by offending numbers 6 and 7 of the Bonbright principles, as they are termed.

[82] With respect, the Energy Board’s assignment of weight to individual factors is not appealable to this Court under s. 36(1).

[83] The Bonbright principles are not a complete set of interlocking jigsaw pieces. They may overlap, conflict or apply only tangentially. They may leave unanswered questions or gaps where other factors will manifest. An example of the latter, critical to this case, is the matching of costs and benefits, an accepted regulatory practice not explicit in the Bonbright list.

[84] The impacts of individual factors will vary with the circumstances. They are for the Board to reconcile. Reconciliation involves the attribution of weight, which is a fact-finding function, not an extractable issue of law.

[85] The extractable issue of law is whether the Board's ruling offends either (1) the statutory criteria in s. 6 of the *Energy and Regulatory Boards Act*, or (2) the *Public Utilities Act's* directive that the rate be "fair, just and reasonable", as explained by Chief Justice MacKeigan.

[86] Whether a factor on which the Board materially relied has *any* relevance may be an extractable issue of law. However, this Court does not second guess the correctness of the Energy Board's attribution of relative weight to the "appropriate" factors under s. 6 of the *Energy and Regulatory Boards Act* or to the relevant factors under the standards in the *Public Utilities Act*.

[87] **The ratemaking principles:** Next are the principles of ratemaking cited by PH Paper. These are inter-class equity, cost causation and retroactivity.

[88] PH Paper's factum summarizes its submission:

54. Despite finding that the NSPML arrangement would not have occurred without the FAM Balance, which NS Power had confirmed that PHP was not responsible for, the NSEB nevertheless found that PHP could be required to pay the costs of the NSPML Arrangement. In so doing, the NSEB failed to address the inter-class equity and cost causation principles that require the class who caused the debt to pay for it. ...

...

69. Restructuring the FAM Balance is not problematic in itself, provided FAM Customers remain liable for it in its restructured form. However, in its Decision, the NSEB expressly allowed a portion of the debt to be migrated to PHP in a future rate class. This clearly violates the rule against retroactive ratemaking, as the NSEB has permitted NS Power to seek recovery from PHP for the short payments of the FAM Customers. ...

70. The rule against retroactive ratemaking exists for a reason: to ensure fairness and transparency for ratepayers. It is not absolute but can only be departed from in limited and exceptional circumstances, and only with valid reason. Here, the NSEB failed to give any consideration in the Decision to the rule against retroactive ratemaking, let alone the compelling reasons to depart from it. PHP submits that this too is an error of law and/or jurisdiction which should lead this court to intervene.

[89] In my view, the Board did not fail to address inter-class equity and cost causation, and its ruling did not offend the principle against retroactivity.

[90] Citing the arrangement set out in the 2024 Term Sheet, the Energy Board's reasons said:

[50] In the present case, the Board finds that the effect of the arrangement, which was explicitly framed as a refund, was to eliminate the existing FAM debt that customers owed to NS Power (for most rate classes). There is no obligation on NS Power's FAM customers to repay the refund provided by NSPML from the proceeds of the new federally guaranteed debt. Rather, the new federally guaranteed debt is being paid as part of the cost of service for the Maritime Link over the next 28 years.

[91] The Energy Board (para. 54) cited the following passage from a 2023 ruling by the Utility and Review Board (2023 NSUARB 175, para. 72):

[72] ... While NS Power is entitled to recover its prudently incurred costs under the FAM, ratepayers face an increased burden as the FAM balance increases. The intergenerational inequity concerns persist and the imbalance continues.

[92] Then, in the Decision under appeal, the Energy Board continued:

[55] The Board notes the intergenerational inequity concern the NSUARB was referencing was the fact that customers at that time were paying for benefits they were not receiving, but which would be received by future customers.

[56] Between January 1, 2018, and December 31, 2024, NS Power's FAM customers paid approximately \$1 billion in costs for the Maritime Link. So, even with the \$500 million (less financing costs) refund of principal and interest payments relating to the Maritime Link by NSPML, NS Power's FAM customers paid considerable amounts for benefits they did not fully receive. The realignment of capital and financing costs for the Maritime Link for recovery over the next 28 years may not be perfect. However, considering the amount of unrefunded costs paid by FAM customers for the Maritime Link and the timing of when benefits were received, the Board finds the refund arrangement results in a far better matching of the costs and benefits of the Maritime Link than what existed before.

[57] The Board finds the refund eliminated the existing debt. The recovery of the refunded principal and interest payments for the Maritime Link have [*sic*] been shifted in time to better match costs and benefits over the next 28 years. Therefore, any future payments by PHP associated with NSPML's recently approved regulatory asset for the new federally guaranteed debt are not payments for costs incurred by other customers, but are payments for the cost of using the

Maritime Link at that point in time. In this regard, PHP would be in the same situation as new customers who join the system in the future.

...

[60] Finally, the Board notes that, at this stage, it is not known whether any tariff that PHP will take service under in the future will require it to pay costs for principal and interest for the federally guaranteed debts for the Maritime Link. As noted previously, PHP did not have to do so under its Load Retention Tariff or the ELIADC [Extra-Large Industrial] Tariff. The original four-year term of the ELIADC Tariff was extended two years to December 31, 2025, and an application is currently before the Board to extend it again to December 31, 2026.

...

[68] The creation and approval of a regulatory asset recognized NSPML's entitlement to the recovery of principal and interest payments relating to the Maritime Link it made from 2018 to date. Further, it shifted the time for the recovery of these costs to the next 28 years to better match costs and benefits. ...

...

[70] The Board denies the requests by PHP and the OATT MEUs to confirm they are not responsible for the payment of costs related to the NSP Maritime Link Inc.'s \$500 million regulatory asset as part of the tolls, rates and charges they pay to NS Power. As with all NS Power's customers, responsibility for these payments will depend on the costs included in the rates set in the tariffs under which these customers may take service in the future.

[93] I agree with the Energy Board.

[94] To summarize:

- *Cost-benefit matching*: What PH Paper terms "cost causation", the Energy Board framed as the matching of costs and benefits.

Before the 2024 Term Sheet, Fuel Adjustment Mechanism customers from 2018 to December 31, 2024 were responsible for full Maritime Link costs that would benefit customers to 2052. The result was inter-generational inequity.

The arrangement set out in the 2024 Term Sheet provided that the loan would refund the Fuel Adjustment Mechanism's negative balance. The refund eliminated the debt owing by Fuel Adjustment Mechanism customers as of December 31, 2024.

The loan was repayable over 28 years from 2024 to 2052.

Hence, NS Power's customers from 2024 to 2052 will pay the

costs of the Maritime Link’s service they obtain from 2024 to 2052.

The arrangement implemented the principle that customers should contribute to the cost of the service they receive.

- *Inter-class equity:* Under PH Paper’s current “below-the-line” Extra-Large Industrial tariff, PH Paper is not responsible for Maritime Link’s costs. Since the Energy Board’s Decision, that tariff has been renewed for PH Paper through December 2026.

In the future, PH Paper will not be responsible for Maritime Link costs unless PH Paper moves to an “above-the-line” tariff that provides for recovery of Maritime Link costs. An example would be the Fuel Adjustment Mechanism tariff. If that happens, PH Paper will be in the same position as every other NS Power customer who is subject to, or who newly adopts that tariff. There is no inter-class inequity.

Adopting PH Paper’s submission would mean: if PH Paper moves to an above-the-line tariff, PH Paper would be exempt from contributing toward Maritime Link costs for a Maritime Link service PH Paper receives, despite that every other customer under that tariff must contribute. That circumstance would conjure the spectre of inter-class inequity.

- *Retroactivity:* The Fuel Adjustment Mechanism balance of December 31, 2024, has been extinguished. The rates to be charged from 2024 through 2052 do not pay that debt. Hence, there is no retroactive rate-setting. Rather, the 2024-2052 rates pay for service provided from 2024 through 2052. This is current rate-setting.

[95] The Energy Board made no extractable error of law. I would dismiss this ground of appeal.

Conclusion

[96] I would dismiss the appeal.

[97] The Industrial Group requested costs from PH Paper. No other party requested costs. The issues had precedential value from a regulatory perspective.

The outcome has significant public interest and a broad financial impact. In an administrative appeal, the Court's practice for such matters is to decline a costs award. There is no basis to depart from the practice. The parties should bear their own costs.

Fichaud J.A.

Concurred: Farrar J.A.

Derrick J.A.