REGULATORY AND POLICY DEVELOPMENTS

FEDERAL COURT OF APPEAL REJECTS APPEAL FROM COPYRIGHT BOARD RETRANSMISSION DECISION

By: John F. Blakney
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In a judgment rendered on June 3, 1991, Mr. Justice Mark MacGuigan rejected an application for judicial review brought by the Canadian Cable Television Association, whose members include over 545 licensed operators of cable television systems across Canada, with respect to the conduct of a member of the Copyright Board during the course of the Board's proceeding to establish royalties for the compulsory retransmission of copyright material by Canadian broadcasters.

The applicants had contended that they had been denied natural justice as the result of the acquisition by a Board member, Michel Latraverse, from CRTC staff and his broker, of information relevant to the determination of retransmission royalties, which information was not disclosed until Mr. Latraverse's dissenting reasons were published with the majority of the Board's decision concerning retransmission royalties. The applicants also argued that the Board member's conduct had raised a reasonable apprehension of bias with respect to the Board which required the decision to be set aside notwithstanding the fact that Mr. Latraverse was not a member of the majority of the Board in this case.

Mr. Latraverse's contacts with the CRTC involved a meeting and telephone conversations in which he attempted to determine the costs of U.S. and Canadian speciality services to Canadian cable TV suppliers and the use of speciality service prices as a proxy for the value of copyright material retransmitted over cable systems by operation of compulsory licence. Mr. Latraverse also contacted his broker by telephone with respect to the financial performance of the Rogers Group of Cable Companies, on which information he apparently relied in questioning representatives of the Rogers Group at the hearing.

The Federal Court noted that while Mr. Latraverse's motives were good, in that he was attempting to improve his expert knowledge in order to render a better decision, his conduct in this circumstance constituted a serious error of judgment. Nevertheless, this error was insufficient to support judicial review on natural justice grounds because:

1. there was no basis on which to conclude that the majority of the Board knew of the information obtained by Mr. Latraverse or took the information into account in making its decision; and
2. there was no reasonable possibility of prejudice of the Board or its decision-making legitimacy as a result of Mr. Latraverse's activities.

These findings were based primarily on the fact that the information obtained by Mr. Latraverse was publicly available and generally repetitive and supplementary to evidence at the hearing. In fact, the applicants had alleged only the lack of an opportunity to exploit the positive aspects of this information and did not allege that they were deprived of an opportunity to rebut any negative aspects of the information. The Court concluded, after examining relevant authorities, that to prove possible prejudice based on an objective standard, there must be a likelihood of an adverse effect on the applicants arising from non-disclosure of the information.

The result might well have been different if Mr. Latraverse had joined in the majority opinion of the Board or if, in his contacts with CRTC officials, he had been provided with expert opinions respecting best service prices and the appropriateness of U.S. speciality service retail rates as a proxy value measure for the totality of

copyrights subject to compulsory retransmission licence. With respect to the bias argument, the Court found that, where the bias alleged was non-pecuniary, the applicant must raise a connection between the biasing events and the case or the party. On the facts of this case, the Court found that Mr. Latraverse had, in informing himself in a special fashion, no stake beyond the actual decision in the case. This would suggest that, to support a bias argument, specially obtained knowledge or opinions of a member of an expert Tribunal must be shown to prejudice the Tribunal member's capacity to look objectively upon the interests of the parties before the Tribunal and the proceeding. Delving into issues of a case in a particular manner in order to develop a stronger case and support a particular conclusion by itself would not constitute grounds to support a bias challenge. However, as noted, such conduct may support a challenge on the basis of natural justice where such off-the-record research, directed at testing propositions raised by parties during the proceeding, could or would have influenced the ultimate decision.

FEDERAL COURT QUASHES EVASION OF EARP GUIDELINES ORDER

By: N.J. Schultz
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In a May 14, 1991 judgment the Federal Court (Trial Division) issued orders against the Minister of the Environment quashing an Order-in-Council exempting a hydro-electric-related development in the area of the Kemano River, British Columbia from the provisions of the Environmental Assessment and Review Process (EARP) Guidelines Order. The judgment also directed the Minister of the Environment, as well as the Ministers of Fisheries and Oceans and Indian Affairs and Northern Development, to comply with the EARP Guidelines Order.

The exemption order was issued following an agreement in 1987 between Alcan Aluminum Limited, the Government of Canada, and the Government of British Columbia. That agreement involved a settlement of an action begun by the Attorney-General of Canada in the British Columbia Supreme Court in the early 1980s for an injunction against further work on the Kemano project. Various federal departments were consulted. The Minister of Transport issued various Declarations of Exemption under the *Navigable Water Protection Act*. The Minister of Fisheries and Oceans expressed an opinion pursuant to subsection 20(1) of the *Fisheries Act* that the flow of water agreed to in the settlement agreement was sufficient for the safety of fish. Alcan renewed work on the project in September 1987 and had spent over $300 million on it by the end of 1990. In 1990, the Minister of the Environment, pursuant to section 6 of the *Department of the Environment Act*, issued the Kemano Completion Project Guidelines. These provided that the EARP Guidelines Order did not apply to the project. Section 6 of the *Department of the Environment Act* provides that the Minister may "for the purposes of carrying out his duties and functions related to environmental quality" establish guidelines for use by federal departments and agencies.

The Court disposed of a number of procedural arguments. In particular, it rejected the argument that *certiorari* was not available to quash an invalid Order-in-Council because the function was legislative and not administrative, such that the appropriate remedy was by way of an action for a declaration. The Court referred to cases which took the view that *certiorari* was available to correct actions involving a lack of jurisdiction. The Supreme Court of Canada is referred to for the following statement:

> *Certiorari* stems from the assumption by the Courts of supervisory powers over certain tribunals in order to assure the proper functioning of the machinery of Government. To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision ....

The Court noted that Alcan had conducted extensive reviews as part of the process leading up to the settlement agreement and that the Departments of Fisheries and Oceans and Transport had been satisfied with the terms of the Agreement. The Court found, however, that the

project fell within the scope of the EARP Guidelines Order and required an assessment under that Order. The Minister of the Environment was under an obligation to arrange for such an assessment and not to frustrate the intent of the EARP Guidelines Order by the settlement agreement and by the order exempting the Kemano project from the EARP Guidelines Order.

The Exemption Order was quashed, as were the Declarations of Exemption issued by the Minister of Transport under the *Navigable Waters Protection Act*. The execution by the Minister of Fisheries and Oceans of the settlement agreement was quashed together with the opinion of the Minister under subsection 20(1) of the *Fisheries Act*.

The case reflects yet another instance in which the Federal Court has asserted its jurisdiction with a view to accountability in federal public administration.

JAMES BAY HYDRO DEVELOPMENT PULLED FURTHER INTO FEDERAL SPHERE

By: N.J. Schultz
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In a March 13, 1991 judgment of the Federal Court (Trial Division) the Cree Regional Authority has been successful in making portions of the *James Bay Agreement* enforceable as federal law.

Sections 22 and 23 of the *Agreement* establish a procedure to be followed with respect to environmental impact studies of future development. They provide for the appointment of a federal administrator to supervise the environmental impact of any future development and to see to the protection of areas under federal jurisdiction. Specific provision is made for the administrator to set up evaluating committees to determine if the proposed development will have any significant impact on the native people or the wildlife resources of the area. If there may be a significant impact, then provision is made for an assessment of that impact.

Parliament confirmed the *Agreement* in July 1977. The preamble to the *Act* states that its purpose is "to approve, give effect to and declare valid" the *James Bay Agreement*. The preamble also states that the Government of Canada has assumed obligations under the *Agreement*. References are made to the establishment of laws, regulations and procedures to protect the environment, particularly remedial and other measures respecting hydro-electric development. The preamble indicates that the Government of Canada recognizes and affirms a special responsibility to protect the rights, privileges and benefits given to Native peoples under the *Agreement*. Provision is made for the making of regulations necessary for the purpose of carrying out the *Agreement* or for giving effect to any of the provisions thereof. Regulations have been made and, pursuant thereto, a federal official has been named as administrator.

The Federal Court has determined that sections 22 and 23 of the *Agreement* were given force of law by the statute carrying the *Agreement* into effect in respect of matters under federal jurisdiction. In addition, the administrator appointed pursuant to federal law was a federal board for the purposes of the *Federal Court Act* and subject to the supervision and direction of the Federal Court under the *Federal Court Act* in carrying out duties and responsibilities under the statute.

The federal government, the government of Québec and Hydro-Québec had argued that the federal statute merely confirmed the *Agreement*, with the sole result that no objection could be taken to its validity; but that the statute did not go so far as to give the *Agreement* the force and effect of law. These parties referred to *Halsbury's Laws of England*, volume 44, paragraph 938, where the distinction is made between statutes which confirm contracts and statutes which require contracts to be carried into effect.

The judgment concludes with a strong statement of the Court's "profound sense of duty" to take jurisdiction where the actions of federal appointees are in issue, particularly where the actions of those officials involve Aboriginal peoples.

NEB ISSUES FINAL APPROVALS FOR TRANSCANADA PIPELINES $2.6 BILLION CONSTRUCTION PROGRAM

By: N.J. Schultz
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On May 9, 1991, the National Energy Board (NEB) issued its third and final decision arising from TransCanada's application to construct $2.6 billion of additional pipeline facilities to serve new markets, primarily in the northeast United States. The NEB's first two decisions last November confirmed a long-standing preference for rolled-in tolls, and also approved a part of the applied-for facilities to permit TCPL to proceed with construction during the 1990/91 winter. Had winter construction not been permitted, the expansion would have been set back a further year.

This most recent decision approves the fifteen gas export applications which were heard at the time of TransCanada's facilities application, and also approves the remainder of the applied-for facilities.

Domestic consuming interests represented by Ontario local distribution companies raised concerns regarding several of the export licence applications. These included the strength of the supply underpinning the applications, as well as the commercial substance of the contractual arrangements between Canadian exporters and U.S. importers. The latter concern relates particularly to the question of whether applied-for facilities will be utilized as expected. Consumers' Gas argued that TCPL should not be permitted to assume that it would automatically be entitled to pass through to other shippers the costs associated with un-utilized capacity. Consumers' argued that the NEB should inform TCPL now that it should be prepared to bear the risk of any unrecovered demand charges. Union Gas similarly argued that the NEB should put the risk of unutilized facilities on TCPL. The NEB was not persuaded that it should "attempt to determine, in advance, the precise toll treatment applicable to future unrecovered demand charges, without full details of the facts which gave rise to the decision."

The Board was also not persuaded by concerns with respect to the supply or contractual arrangements supporting various of the applied-for exports. In each case, the NEB resolved any doubt in favour of the market choices of the parties to the export arrangement. Consistent with its market-oriented approach, the NEB was not persuaded that the circumstances warranted intervention.

The decision is noteworthy in that it clearly signals that the NEB is no longer interested in of the business of sheltering participants in the gas market from market forces. Buyers and sellers must make their choices in a competitive environment and live with those choices. The NEB will intervene only where there is clear evidence of market failure.

COMMENTARY: FREE TRADE AND ENERGY AND THE ROLE OF REGULATORS

By: N.J. Schultz
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Free trade implies the absence of government restraint on commerce between private persons. Like freedom in general, free trade is an idea which exists in practice to a limited extent. There are known failings which warrant some degree of government intervention in free markets. The questions which immediately arise are what types of failings justify intervention and, perhaps more importantly, what type of regulatory action is required to support trade within the sphere where freedom is permitted.

This is not merely a question of parsing the various exceptions to free or liberalized trade contemplated by the *Canada/U.S. Free Trade Agreement* and the *GATT* Articles incorporated therein. Nor is it solely a matter of pulling out all the implications of the regulatory authority which may be in place. The question, in this context, is not what <u>can</u> be done but rather what <u>should be</u> done if one is to focus on free trade as the primary principle.

A commitment to free trade in energy entails a commitment to the allocation of energy goods through market forces. This implies, obviously, that market forces must be permitted to work and that participants in the marketplace must feel those forces. Hence, protection of either buyers or sellers from market forces is inconsistent with the principle of free trade.

On the other hand, reliance on market forces implies that the market will work. Market failure forms a classic basis for government intervention in the marketplace. Intervention for this reason is well-supported in economic theory. The difficulty is in identifying what, in any given circumstance, constitutes market failure. Predicting what will happen in energy markets typically involves looking well into the future—fifteen or twenty-five or thirty years. The complexity of such analysis tends to undermine its reliability. The present reliance on market forces in Canadian energy policy has its origins in the failure of previous interventionist policies. Hence, regulators are less uncomfortable with the uncertainty inherent in free market. However, in time the possibilities for market failure may come to dominate thought, and people will forget the regulatory failures of the past.

Reliance on market forces also requires the existence of workable competition. The energy industry is characterized by bottleneck facilities such as pipelines, and there is a clear economic justification for regulating such facilities. To be consistent with the principle of free trade, regulation of bottleneck pipeline facilities should foster the creation and maintenance of the conditions necessary for competition. In short, the principle of regulation should be the protection of competition.

It is, however, frequently the case that competitors seek to obtain protection through regulatory advantage. The difficulty for regulators is in distinguishing between submissions which are intended to protect competition more effectively and submissions which are intended merely to protect competitors. The issue is further complicated because pursuit of the competitive ideal to the extreme could lead to the wasteful creation of unused capacity. In addition, once contracts are signed parties will be bound, and that alone affects the choices parties are free to make.

Recently, an effort by the California Public Utilities Commission (CPUC) to restructure existing contracts, in an effort to achieve what the CPUC views as a more competitive gas market in California, has provoked opposition from the governments of Alberta and Canada as well as the Canadian Petroleum Association. Underlying the opposition is the concern that the CPUC is interfering with private commercial arrangements. Stripped to its essence, the argument is that free trade implies respect for such arrangements.

Government intervention has also been justified in an effort to protect consumers from unfair traders. Buyers and sellers of energy commodities tend, on the whole, to be of comparable bargaining position. To the extent that the buyer has little experience, there are many experienced brokers willing to sell their knowledge. Those who are active in the energy market have the common sense and commercial incentive to seek out the expertise they may lack. There is, therefore, little requirement for the kind of consumer protection measures which exist, for example, in the lending or securities areas.

Finally, a significant aspect of energy regulation has been to provide consumers with a security blanket. If consumers are to have market choices, and if those choices are to be disciplined, it must be accepted that consumers will have to take responsibility for their own choices. The choice by a consumer of an unreliable gas supplier may mean that the consumer will find that the gas supply contract is merely a piece of paper. In a working competitive market, however, for every supplier having difficulty meeting their obligations there will be others willing to take their place. In addition, occasional small scale failures of this type may well be said to be a lesser evil than the massive consequences of regulatory failure.

In conclusion, one can capture the principles at play in a free trade environment under the following headings:

- protection from market failure as against protection from market forces;
- protection of competition as against protection of competitors; and
- protection of consumers from unfair traders

as against protection of consumers from unwise choices.

In each pair of opposites, the former is consistent with the principle of free trade while the latter is not.

This commentary is based on Canada/U.S. Free Trade Agreement—Two Years After, a presentation to the Section on Energy and Natural Resources Law of the International Bar Association in Montreal, Canada, on June 3, 1991.

TELECOMMUNICATIONS RESALE AND SHARING: MORE CLARIFICATION, MORE COMPLICATION

By: John F. Blakney
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In three recent decisions respecting possible liberalization of competition in telecommunication services through resale and sharing of carrier services, the CRTC has introduced a number of new standards for defining the permissible limits of resale and sharing competition in the Canadian market. At the same time, these decisions expose a significant underlying uncertainty on the part of the Commission concerning when and how further resale should be permitted. The Commission continues to struggle on a case-by-case basis with the awkward fact that, having accepted the resale of interconnected private-line services to provide a direct substitute to long-distance service, it has placed itself on a slippery slope towards unlimited resale and sharing of all domestic carrier services.

These decisions represent efforts by the Commission to continue to control the expansion of the resale and sharing industry to preserve the notion that competition in this form should be structured in order to neutralize its impact on local and long-distance rates.

In a decision released on February 27, 1991 (Telecom Decision CRTC 91-3), the CRTC reiterated this position, giving detailed reasons for permitting regulated carriers such as Bell and BCTel to respond to price competition from resellers by providing services that include volume discounts for larger users while, at the same time, preventing resellers from themselves acquiring such volume-discount services for the purpose of resale. At issue was the revised Advantage Canada message toll service discount structure initially approved by the Commission in late 1990. Call-Net, a major Ontario-based reseller, requested a review of the Commission's denial to rescind its approval of these services and further applied for an order permitting the resale of Advantage Canada.

In electing not to review its approval of these services, the Commission made reference to the economic evaluation filed by the telephone companies with the proposed Advantage Canada tariff. The Commission is increasingly relying on these documents as the basis for finding that the introduction of a new service would not generate anti-competitive cross-subsidies. In this case, the Commission noted that the economic evaluation indicated that Advantage Canada will more than cover its associated costs and that therefore no cross-subsidization concerns arise. However, this exercise is one that the Commission must of necessity conduct behind closed doors, since such studies as were filed contain considerable information of use to competitors. One major difficulty with these studies, where what is being introduced is, in effect, a discount scheme for an existing product which is increasingly subject to competition, is the accurate estimation of the amount of demand for the new discount service. This demand is generally taken to be the amount of traffic taken back from resellers, who in turn are estimated to take a certain amount of traffic from basic long-distance service. While there may be some demand stimulation estimated for the discounts themselves, determining this estimate is also a difficult exercise. There are considerable differences in opinion as to whether additional business call demand is generated by price reductions associated with volume discount plans.

In denying the request for resale of Advantage Canada, the Commission noted that it had already deferred the question of Wide Area Telephone Service (WATS) resale, to be determined in the context of the current proceeding on interexchange

competition prompted by the applications of Unitel and BCRL.

The Commission found that Advantage Canada was more comparable to WATS than to regular message toll service (for which resale is already permitted). The key feature in this finding is that both WATS and Advantage Canada provide a volume-based or bulk discount relative to full rate WATS. The volume-based or bulk discount aspect of these services has resulted in Commission and carrier concerns over the contribution erosion that might arise from their resale. This concern, however, is really only a matter of degree since contribution erosion is inevitable through any form of resale. This is the reason for resale in the first place. Measures to deal with access contribution erosion were implemented with respect to private-line resale for interconnected voice service when this additional form of resale was allowed in 1990.

Thus, the Commission has been drawn into setting what are essentially artificial distinctions between services in order to preserve some degree of control over the evolution of the resale market. The net result for the time being is that resellers are exposed to price-matching competition from carriers such as Bell and BCTel, but are themselves restrained from answering the carriers by extending their resale activities to those particular price-matching discount products.

In *Bell Canada* v. *Distributel* (Telecom Decision CRTC 1991-6), the Commission addressed the question of whether permitted resale of local services could include a reseller patching together resold local services in several local calling areas in order to provide an equivalent to long-distance service using its own switches. The Commission had previously allowed Distributel to provide Centrex III service resale from a core downtown Toronto exchange from which its customers could call using local lines connecting to other exchanges. The distance covered by this resale arrangement would otherwise be subject to message toll charges.

However, in the present case, the Commission concluded that resale should not be allowed where the reseller's network configuration involved the linking of local services by the reseller to provide service between exchanges where message toll services would apply. The Commission has in effect found that a reseller may only patch together local services where the reseller provides but one leg of the end-to-end call, and the carrier provides the other leg through basic local service acquired by the reseller's customers. This distinction, however arbitrary it may seem to the casual observer, has allowed the Commission to prevent resellers from providing a multiple-link local exchange service-based resell network on a basis that the service effectively being provided by the reseller is an interexchange service. Currently, the Commission's resale and sharing rules do not permit the resale of local services to provide an interexchange service.

In Telecom Decision CRTC 1991-8 dated May 30, 1991, the CRTC considered whether resale and sharing of cellular services should be prevented. Cellular service providers have resisted resale of their services except for limited duration uses such as cellular phones in rental cars. A majority of the Commission concluded that resale of cellular services would give rise to consumer benefits. However, the majority also concluded that cellular service providers should be assured a stable source of revenues in order to meet the capital requirements of continuing to upgrade and extend their existing networks. The Commission was concerned that unless these revenues continued to grow "at a reasonable rate", the suppliers would not be able to extend their networks for areas which are underserved or not yet served at all. The majority found that, as a matter of fact, resale might increase the choice of supply, but that it would also inhibit the upgrading and expansion of the underlying network. In adopting an infant-industry argument, the Commission has left the door open to allowing unrestricted resale of cellular services once the industry matures to a degree. However, given the high cost and discretionary nature of cellular services, it is hard to see how an objective standard of service maturity could be established. It is very likely that, for the foreseeable future, the existing duopoly of cellular services will have to continue to maintain some geographic cross-subsidies to less dense markets such as the Maritime provinces in order to meet the terms of their facilities licences in a manner satisfactory to

the Department of Communications.

In a dissent, Vice-Chairman Bud Sherman noted that the majority decision was inconsistent with the Commission's own position with respect to cellular services, which is that the benefits of cellular service are likely to be enhanced for Canadians if the provision of such service is shaped as fully as possible by market forces rather than by regulation. Mr. Sherman specifically rejected the contention of the cellular service providers that competition is achieved by an industry structure which involves a number of local companies acting as agents for the providers. He noted with respect to this distribution arrangement: "at best the existing situation merely represents another level of competition between the existing duopolies. It entirely begs the question of resale."

Mr. Sherman also indicated that resale would correct the significant inequity that exists in the market, which he described as a "sanctioned duopoly structure that confers certain arbitrary powers on cellular providers". Commissioner Sherman noted that the record of the case indicated that the cellular providers enjoy a right to pick and choose the type of resale they will allow, whether long-term or short-term, but they also wish to retain the right to be selective in "individualized treatment of resellers".

The majority's reasons also raise the question of the role of cellular services in the overall telecommunications services sector. In emphasizing the need for market protection to permit network development, the majority of the Commission has implicitly characterized cellular as another form of basic telecommunication service which requires geographic cross-subsidies or universal availability. This approach fails to recognize that basic land-line telephone service access is already assured and that cellular is a competitive service with effective substitutes such as radio-telephone and paging services which are themselves effectively unregulated and not obliged to assure any degree of geographic coverage. Radio-telephone and paging services have achieved a high degree of geographic coverage even in a less dense market without regulatory protection for competitive entry, and at prices much lower than the price of cellular. It may be that the appropriate solution to the problem of extending cellular services to less dense markets would be to license additional cellular services in these markets and to require interconnection, if necessary, between these new services and the established duopoly in addition to land-line carriers, rather than relying on the existing duopoly structure (with resale and sharing competition protection) to take these services into smaller markets.

CALIFORNIA PUBLIC UTILITIES DECISION PROVOKES STRONG CANADIAN REACTION

By: N.J. Schultz
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The California Public Utilities Commission (CPUC), in an effort to enhance the gas purchasing choices of California consumers, has taken steps to break the existing gas sales arrangements between Alberta producers and California utilities. The result has been an application dated May 30, 1991 from the Canadian Petroleum Association (CPA) to the National Energy Board (NEB) to review the gas export licences of Alberta and Southern Gas Co. Ltd. (A&S) which presently supplies the major northern California utility, Pacific Gas and Electric Company (PG&E). The Alberta government also introduced legislation on June 3, 1991 which will extend the existing arrangements between A&S and Alberta producers. Those arrangements had been slated for review this summer.

The arrangements between Alberta producers and A&S date back to the early 1960s when PG&E sought Canadian gas. PG&E created A&S to purchase gas in Canada on its behalf. PG&E also built the pipeline from northern California, Pacific Gas Transmission, to connect to Canadian gas. The contracts between A&S and Alberta producers provide that the price at the field gate is to be determined on a net-back basis from the market price. Such net-back pricing arrangements require approval by the producers on the basis of fifty per cent by number and sixty per cent by volume in

accordance with rules administered by the Alberta Petroleum Marketing Commission. The previous approval of the pricing arrangement was to expire July 1, 1991. The Alberta legislation would extend this for at least one more year and possibly two.

The CPUC has proposed that PG&E re-negotiate its contract by December 31, 1991. The CPUC wishes to give California consumers the opportunity to acquire gas directly from Alberta producers and use the connecting transportation links on an open access basis. This involves restructuring the existing sales arrangements so that A&S would no longer be the major supplier of Canadian gas to PG&E, and PG&E would no longer acquire that gas on behalf of its customers.

The regulatory actions by the CPUC have already led to a letter from the government of Canada objecting that the proposal violates the principles of free trade. Strong statements have been made for some time by the Alberta Minister of Energy that the CPUC is interfering with commercial contracts in a manner inconsistent with market-oriented policies. Now there is a legislative response by the Alberta Government, and the CPA is attempting to invoke the regulatory authority of the NEB.

Driving this issue is the CPUC's desire to obtain direct access to Alberta gas which, because of surplus conditions in Alberta, is selling in Alberta for less than the A&S price. The A&S price tends to reflect competitive conditions in the California market. Driving the opposition are the concerns that Canadian gas will be sold at prices which do not reflect the fair value of the resource, and that the appropriate place to determine price is in the California marketplace.