Appeal Nos. 01-002, 01-003 and 01-005-CD

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Costs Decision

Date of Decision – February 8, 2002

IN THE MATTER OF sections 91 and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by Mr. James Paron, the Village of Wabamun, and the Lake Wabamun Enhancement and Protection Association with respect to Approval 10323-02-00 issued on November 30, 2000 to TransAlta Utilities Corporation by the Director, Northern East Slopes Region, Environmental Service, Alberta Environment.

Cite as: Costs Decision: *Paron et al.*

BEFORE	William A. Tilleman, Q.C.
SUBMISSIONS	
Appellants:	Mr. James Paron represented by Mr. I. Samuel Kravinchuk; the Village of Wabamun represented by Mr. Barry Sjolie, Brownlee Fryett; and the Lake Wabamun Enhancement and Protection Association, represented by Mr. Brian O'Ferrall, Q.C., Bennett Jones.
Director:	Mr. Rick Ostertag, Director, Northern East Slopes Region, Environmental Service, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.
Approval Holder:	TransAlta Utilities Corporation, represented by Mr. Ron Kruhlak, McLennan Ross and Mr. Alan Harvie, McLeod Dixon.
Other:	Enmax Energy Corporation, represented by Mr. Lou Cusano, Donahue Ernst & Young.

EXECUTIVE SUMMARY

The Board held a preliminary meeting, a mediation meeting and settlement conference, and a hearing related to a number of appeals in relation to Approval No. 10323-02-00 issued to TransAlta Utilities Corporation (TransAlta) for the operation and reclamation of the Lake Wabamun Thermal Electric Power Plant, located in the Village of Wabamun, west of Edmonton, Alberta. Ten appeals were received by the Board in response to the Approval being issued to TransAlta. Among these were appeals filed by the Enmax Energy Corporation (Enmax), Mr. James Paron, the Village of Wabamun, and the Lake Wabamun Enhancement and Protection Association (LWEPA).

Enmax was concerned that some of the conditions of the Approval would result in cost increases to Enmax as a result of a Power Purchase Agreement it had entered into with TransAlta, and Enmax sought to have these conditions changed. LWEPA filed an appeal opposing the changes requested by Enmax. (Enmax's appeal was subsequently dismissed by the Board following the preliminary meeting.)

Mr. Paron's appeal sought to have certain conditions of the Approval strengthened. The Village of Wabmun's appeal sought to delay the implementation of certain provisions of the Approval. Following the hearing of this appeal, Mr. Paron, the Village of Wabamun, and LWEPA filed requests for final costs. LWEPA only requested final costs in relation to its participation at the preliminary meeting.

The Board approved the request for final costs by LWEPA (in the amount of $5,079.25) in relation to the preliminary meeting only. The Board has denied the request for final costs by Mr. Paron and the Village of Wabamun. The costs awarded to LWEPA are to be paid by Enmax.

TABLE OF CONTENTS

I. BACKGROUND

[1] On November 30, 2000, the Director, Northern East Slopes Region, Environmental Service, Alberta Environment (the "Director") issued Approval 10323-02-00 (the "Approval") under what is now the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "Act") to TransAlta Utilities Corporation (the "Approval Holder" or "TransAlta") for the operation and reclamation of the Wabamun Thermal Electric Power Plant (the "Wabamun Power Plant"), in the Village of Wabamun, in the Province of Alberta.

[2] On December 28, 2000, and January 2, 3, 4, and 10, 2001, the Environmental Appeal Board (the "Board") received Notices of Appeal from the following parties (collectively the "Appellants"):

1. Ms. Gwen Bailey;
2. Enmax Energy Corporation ("Enmax");
3. Mr. Nick Zon;
4. Mr. Blair Carmichael;
5. Ms. Donna Thomas and the Summer Village of Kapasiwin;
6. Mr. James Paron;
7. the Village of Wabamun;
8. Mr. David Doull;
9. the Lake Wabamun Enhancement and Protection Association ("LWEPA"); and
10. the Summer Village of Point Alison.

[3] The Board acknowledged receipt of each of the Notices of Appeal and requested that the Director provide a copy of the records (the "Records") related to the matter appealed. The Board also advised the Approval Holder of the appeals and provided the Approval Holder and the Director with copies of the Notices of Appeal. The Board subsequently received the Records from the Director and provided a copy of the Records to each of the other parties to these appeals.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the Alberta Energy and Utilities Board (the "AEUB")

asking whether this matter has been the subject of a hearing or review under their respective legislation. The NRCB replied in the negative.

[5] With respect to the AEUB's jurisdiction, the Board was advised that TransAlta currently holds AEUB Approval No. HE 8109 with respect to the Wabamun Power Plant. The Board was provided with a copy of AEUB Decision Report 81-6 that formed the basis for AEUB Approval No. HE 8109.

[6] On January 19, 2001, the Approval Holder requested that the Board expedite the appeal and set a March date for a hearing. The Board also received a letter from LWEPA, dated January 23, 2001, supporting the Approval Holder's request for an expedited hearing.

[7] On January 25, 2001, the Board wrote to the Appellants, the Approval Holder, and the Director advising that it would proceed to an oral preliminary meeting. The Board advised that at the preliminary meeting it would consider the status of the appeal filed by Enmax and determine which of the issues included in the Notices of Appeal would be included in the hearing of the appeals. Subsequently, the Board advised the parties that it would hold an oral preliminary meeting on March 1, 2001, at the Board's offices in Edmonton.

[8] In a written decision,[1] (the "March 13, 2001 Decision") the Board dismissed the Notice of Appeal of Enmax.[2] In making this decision, the Board considered four issues: (1) that Enmax had not filed a Statement of Concern; (2) that this was not the appropriate circumstance to extend the time for Enmax to file a Statement of Concern; (3) that Enmax is not in the same position as an Approval Holder (i.e. able to file a Notice of Appeal without having filed a Statement of Concern); and (4) that the issues raised by Enmax "…ought not to be heard by the Board because what the Board is being asked to decide is to be decided or has been decided by another regulatory regime [- the AEUB]."[3]

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1 Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.), (*sub nom.* Bailey *et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

2 E.A.B. Appeal No. 00-075.

3 Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraphs 16 to 35, (*sub nom.* Bailey *et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID. See: Closing Submission by Mr. Brian O'Ferrall on behalf of LWEPA, Preliminary Meeting Transcript, page 171.

[9] In the March 13, 2001 Decision, the Board also confirmed that "… the remaining Appellants are directly affected by the Wabamun Power Plant and, as a result, have standing with respect to these appeals."[4] In this decision, the Board also determined it would be considering the following issues in the hearing of the remaining appeals:

- public safety, solely as it relates to TransAlta's operations and the impact on winter ice;
- harvesting weeds, but solely on the matter of alternate technologies - chemical, physical, or other such technologies - to enhance TransAlta's current weed control program;
- sediment deposition at Point Alison;
- the definitions of decommissioning and cooling water in the Approval;
- the watershed management plan; and
- sections 4.1.2 and 4.3.27 of the Approval, regarding timing and duration only, but including the length (the term) of the Approval.

[10] As standard practice, the Board advised all parties that mediation was available to parties in an appeal. The Board held Mediation Meetings and Settlement Conferences on March 13, 14, and 19, 2001. The mediations were generally unsuccessful. At the end of the last mediation, the Board told the parties that a hearing would be held on April 18 and 19, 2001.

[11] Following the mediation, the Board received the following preliminary motions:

1. Reconsideration Request (lake levels) by Mr. Zon dated March 15, 2001;
2. Reconsideration Request (lake levels) by Mr. Doull dated March 15, 2001;
3. Adjournment Request by Mr. Zon dated March 19, 2001;
4. Interim Costs Request by Mr. Zon dated March 19, 2001;
5. Reconsideration Request (AEUB licence and priority number) by Mr. Zon dated March 22, 2001;
6. Interim Costs Request by Mr. Carmichael dated March 23, 2001;
7. Reconsideration Request (delta T) by Mr. Zon dated March 26, 2001; and
8. Interim Costs Request by LWEPA dated March 26, 2001.

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[4] Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 75, (*sub nom.* Bailey *et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

[12] On April 6, 2001, following the receipt of written submissions on these preliminary motions, the Board wrote to the parties and advised that all of the preliminary motions had been denied. The Board provided reasons on April 17, 2001.[5]

[13] On April 18 and 19, 2001, following the receipt of written submissions, the Board held a hearing with respect to the remaining appeals. Following the hearing, on May 18, 2001, the Board's Report and Recommendations was forwarded to the Minister of Environment (the "Report and Recommendations").[6] In the Report and Recommendations, the Board recommended that: the definitions of decommissioning and cooling water be confirmed; that the provision of the Approval dealing with the watershed management plan be confirmed; that section 4.1.2 and the ten-year term of the Approval be confirmed; that two provisions associated with section 4.3.27 be added as suggested by TransAlta during the course of the hearing; and that section 4.1.3 be amended in accordance with an agreement reached between TransAlta and some of the Appellants.[7] On June 20, 2001, the Minister accepted the Board's recommendations and issued a Ministerial Order implementing the changes.[8]

[14] In the Report and Recommendations, the Board noted that LWEPA and the Village of Wabamun had made applications for costs[9] and indicated that it was prepared to receive written cost applications from any party in these appeals. It was subsequently noted that a request for costs had also been included in Mr. Paron's written submissions.[10] The Board requested written arguments on these costs applications and that these written arguments should discuss who should bear these costs.[11] The Board also noted that:

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5 Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 94 (A.E.A.B.), (*sub nom.* Preliminary Motions: *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

6 *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R.

7 *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 130.

8 Ministerial Order 20/2001, dated June 20, 2001.

9 *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 133.

10 See: Letter of July 3, 2001 from Mr. Paron.

11 *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at

> "… the initial reason that LWEPA filed a Notice of Appeal was to oppose the Notice of Appeal from Enmax. As a result, the Board would like to receive arguments, including arguments from Enmax, as to whether Enmax should bear any portion of the costs claimed by LWEPA."[12]

[15] On June 29, 2001, the Board wrote to the parties and asked that applications for costs be submitted by July 5, 2001 and that responses to these costs submissions should be submitted to the Board by July 12, 2001. The deadline for the submission of costs applications was subsequently extended to July 9, 2001. Three costs applications were received. These applications were from the Village of Wabamun, Mr. Paron, and LWEPA.

[16] On September 21, 2001, the Board wrote to the parties and advised that:

> "With respect to the costs application by LWEPA, the Board has decided to award costs with respect to the Preliminary Meeting only, in the amount of $5079.25. With respect to the costs applications on behalf of Mr. Paron and the Village of Wabamun, the Board has decided not to award costs."

The Board indicated that reasons for this decision would follow. These are the reasons.

II. COSTS SUBMISSIONS

A. Village of Wabamun Costs Request

[17] In its written submission of April 11, 2001, the Village of Wabamun indicated that it would seek costs incurred during the appeal. The Village of Wabamun indicated that it was required to retain legal counsel in order to prepare its submissions for the preliminary meeting and hearing and that the fees to the date of the written submission were $10,450.00. The Village of Wabamun indicated that it is uniquely affected by the operation of the Wabamun Power Plant and because of this interest, it was seeking to delay the implementation of certain portions of the Approval.

[18] In its costs application of July 4, 2001, the Village of Wabamun requested consideration of its legal fees in the amount of $19,503.95. The Village of Wabamun provided

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paragraph 134.

[12] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 134.

two invoices for these legal fees: the first dated March 26, 2001 for $10,452.84 and the second dated April 27, 2001. The breakdown of these fees were:

Professional Fees	$ 17,418.75	
Disbursements	$ 100.88	(No Details Specified)
Other Charges	$ 708.36	(No Details Specified)
GST	$ 1,275.96	
Total Legal Fees	$ 19,503.95	

[19] The Village of Wabamun indicated that these costs were in relation to the preparation of the written submission and presentation at the preliminary meeting and the preparation of the written submission for the hearing. The Village of Wabamun noted that the Village's Chief Administrative Officer attended the hearing. The Village indicated that they felt compelled to retain legal counsel to assist them because they were not considered "directly affected" in the previous hearing, that the issues to be addressed were complex, and that they needed to respond to submissions by other legal counsel. The Village of Wabamun argued that they contributed to the hearing by identifying that their views were not shared by the other Appellants. For example, the Village provided information regarding the potential dangers of open ice; health concerns regarding the proposals of other Appellants respecting weed control; and the potential economic impacts of this Approval on the Village.

B. Mr. Paron's Costs Request

[20] Counsel for Mr. Paron requested costs indicating that Mr. Paron's intentions were included in Mr. Paron's written submission and that TransAlta should bear the costs.[13] In the July 4, 2001 letter on behalf of Mr. Paron, the costs request indicated that legal fees in excess of $10,000.00 were incurred. In a subsequent letter of July 9, 2001, the legal fees of Mr. Paron were detailed as follows:

[13] See: Letter of July 3, 2001 from Mr. Paron.

Professional Fees	$ 23,900.00	
Disbursements	$ 127.59	(Long Distance and Couriers)
Other Charges	$ 455.00	(Copies and Faxes)
GST	$ 1,713.78	
Total Legal Fees	$ 26,196.27	

No other arguments respecting the request for costs were provided.

C. LWEPA's Costs Request

[21] LWEPA's costs request, dated June 26, 2001, was for the amount of $5079.25 incurred in preparation for the March 1, 2001 preliminary meeting and were comprised principally of legal fees. Specifically, the costs requested by LWEPA were as follows:

Professional Fees	$ 4,012.70	
Disbursements	$ 213.11	(Travel Expense and Couriers)
Other Charges	$ 447.09	(Long Distance, Fax, and Copying)
GST	$ 327.10	
Total Legal Fees	$ 5,000.00	
Other Photocopying Charges	$ 45.15	
Other Courier Services	$ 23.40	
Search Services	$ 10.70	
Total Costs Requested	$ 5,079.25	

Copies of LWEPA's invoices and receipts were provided to the Board.

[22] LWEPA incurred their costs apparently as a result of the timing of the preliminary meeting. LWEPA indicated that they are directly affected by the decision under appeal, that the costs being claimed are reasonably related to the preliminary meeting and include the preparation and presentation of LWEPA's concerns at the preliminary meeting, that the intervention of LWEPA raised matters of broad public interest and concern, and that LWEPA had contributed information that was not otherwise brought to the attention of the Board and that the Board relied on this information in rendering its March 1, 2001 Decision. LWEPA pointed out that their members have contributed over 1000 hours of volunteer time to participate in the regulatory process, including the issuance of the Approval. LWEPA indicated that as a non-profit organization, their resources are limited.

D. Director's Submission on Costs

[23] In its letter of July 3, 2001, the Director indicated that the Board's authority to award costs is found in what is now section 96[14] of the Act and section 20 of the *Environmental Appeal Board Regulation*, A.R. 114/93 (the "Regulation").[15] The Director indicated that the Board's position has been that its hearings "…do not produce judicial winners and losers and the Board is not bound by the principle that the loser pays…."[16] The Director's submission indicated that the Report and Recommendations of the Board, as confirmed by the Minister, indicate that the Director's decision in this matter was reasonable and highlighted the positive comments of the Board with respect to the Director. In summary, the Director neither sought

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[14] Section 96 of the Act provides:

> "The Board may award costs of and incidental to any proceeding before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid."

This section was previously section 88 in the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 and is referred to as such in previous decisions of the Board.

[15] Section 20 of the Regulation provides:

> "(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.
>
> (2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:
>
> (a) whether there was a meeting under section 11 or 13(a) [(a Mediation Meeting or Settlement Conference)];
>
> (b) whether interim costs were awarded;
>
> (c) whether an oral hearing was held in the course of the appeal;
>
> (d) whether the application for costs was filed with the appropriate information;
>
> (e) whether the party applying for costs required financial resources to make an appropriate submission;
>
> (f) whether the submission of the party made a substantial contribution to the appeal;
>
> (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
>
> (h) any further criteria the Board considers appropriate.
>
> (3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of
>
> (a) any other party to the appeal that the Board may direct;
>
> (b) the Board.
>
> (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[16] See: Letter of July 3, 2001 from the Director quoting *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 7.

costs, nor agreed to have costs assessed against it. The Director did not express an opinion on the costs applications of the other parties.

E. TransAlta's Submission on Costs

[24] In their written submission dated July 16, 2001, TransAlta advised that, as the Board noted in its Report and Recommendations, TransAlta and the Director had engaged in an extensive public consultation process prior to the issuance of this Approval, and the parties requesting costs had the opportunity to participate in this public consultation process. TransAlta directed the Board's attention to the previous costs decision in relation to the Wabamun Power Plant in 1997[17] where the Board held that the contribution by the Appellants, the Approval Holder, and the Director were equal, and therefore, a costs award could not be justified. TransAlta indicated that in this case the contributions of the Appellants have been consistent with the contribution of the other parties involved in this appeal, and the same principle should apply here as in the 1997 decision. Further, in general, TransAlta expressed the view that the costs requests have not provided sufficient justification for a costs award.

[25] With respect to LWEPA, TransAlta indicated that it was their understanding that LWEPA felt compelled to participate as a result of the appeal filed by Enmax. TransAlta indicated that if LWEPA was entitled to costs, the costs should only relate to the preliminary meeting because Enmax's appeal was dismissed and that costs should be awarded against Enmax. TransAlta argued that the Board may award costs against Enmax as the Board did not indicate that Enmax was not a party to appeal, but rather that Enmax did not have "...a valid appeal before the Board."[18] TransAlta also pointed to section 1(f) of the Regulation that indicates that a party includes "…any other person the Board decides should be a party to the appeal."[19]

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[17] Re: *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (A.E.A.B.), (*sub nom.* Costs Decision re: *Zon et al.*), E.A.B. Appeal No. 97-005-97-015.

[18] See: Letter dated July 16, 2001 quoting Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 94 (A.E.A.B.) at paragraph 44, (*sub nom.* Preliminary Motions: *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

[19] Section 1(f) of the Regulation provides:

"In this Regulation … (f) "party" means

(i) the person who files a notice of appeal that results in an appeal,

(ii) the person whose decision is the subject of the notice of appeal,

TransAlta added the Board is granted considerable discretion in its ability to award final costs under section 20 of the Regulation.

[26] With respect to the Village of Wabamun and Mr. Paron, TransAlta argued that the costs requests of these parties did not include any evidence that these parties required financial assistance to make adequate submissions. With respect to Mr. Paron, TransAlta noted that he did not participate in the public consultation process prior to the issuance of the Approval. Further, TransAlta expressed the view that the Board did not find the submissions presented on behalf of Mr. Paron of assistance in preparing its Report and Recommendations.

F. Enmax's Submission on Costs

[27] Enmax argued that the Board does not have the jurisdiction to order Enmax to pay costs. Enmax indicated that it was found not to be a party in the appeal in the Board's March 13, 2001 Decision. Enmax noted that during the preliminary meeting, the Chairman noted that:

> "I should also let all parties know, not only Enmax, that for the purposes of the allocation of costs, if any, that if a person is accorded party status they are also responsible for, or they are potentially responsible for costs."[20]

Enmax argued that this "correctly" states the law and indicated that the Board does not have the jurisdiction to award costs against Enmax.

[28] In the alternative, Enmax argued that if the Board finds it does have the jurisdiction, it should not exercise its discretion to award costs against Enmax. In particular, Enmax argued that its appeal was not against LWEPA, but against the Director and TransAlta. Enmax argued that the requirements in section 18 of the Regulation,[21] in particular that costs

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(ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the Water Act, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and

(iii) any other person the Board decides should be a party to the appeal.

20 Preliminary Meeting Transcript, pages 40 and 41, lines 25 to 3.

21 Section 18 of the Regulation provides:

"(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

must relate to the matter included within the Notice of Appeal and the preparation and presentation of the party's submission, and previous Board decisions that confirm that these are requirements of a costs application, support the position that the Board should not exercise its discretion to award costs. Enmax noted that despite its appeal being dismissed, LWEPA continued to actively participate in the appeal.

[29] In the further alternative, Enmax argued that if the Board finds jurisdiction, and that it is appropriate to award costs in this case, then Enmax should only be required to pay a proportionate share of the costs.

III. DISCUSSION

A. Statutory Basis for Costs

[30] In any decision on costs, the purpose of the Act must be considered. The purposes of the Act are found in section 2 which provides:

> "The purpose of the Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well being of society;…
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;…
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual action;
>
> (g) the opportunities made available though this Act for citizens to provide advice on decisions affecting the environment; …"

While all of these purposes are important, the Board is of the view that the shared responsibility that section 2(f) of the Act places on all Albertans "…for ensuring the protection, enhancement and wise use of the environment through individual action…" is particularly instructive in making its costs decision.

(a) the matters contained in the notice of appeal, and

(b) the preparation and presentation of the party's submission."

[31] The Board's jurisdiction and discretion to award costs is found in section 96 of the Act. This section provides:

> "The Board may award costs of and incidental to any proceeding before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid."

This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre Exploration Ltd.*:[22]

> "Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it…'. The legislation gives the Board broad discretion in deciding whether and how to award costs."[23]

Further, Mr. Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs … and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid….'" [Emphasis in the original.][24]

[32] The Regulation provides in section 18 that:

> "(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
>
> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
>
> (a) the matters contained in the notice of appeal, and
>
> (b) the preparation and presentation of the party's submission."

The criteria detailed in section 18(2) are not entirely discretionary.[25] In the Board's view, the only costs that the Board may award are costs that (a) relate to the matters contained in the notice of appeal (i.e. costs cannot be awarded with respect to matters not included in the notice of appeal), and (b) that relate to the preparation and presentation of a submission (i.e. costs cannot

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[22] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.).

[23] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 23.

[24] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

[25] See: Costs Decision re: *Monner* (October 17, 2000), E.A.B. Appeal No. 99-166-CD at paragraph 25.

be awarded with respect to matters that do not relate to the preparation and presentation of a submission).

[33] Further, with respect to final costs, section 20 of the Regulation provides, among other things, a list of criteria that the Board may consider in deciding whether to award costs and the amount of costs to be awarded. This section provides:

> "(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.
>
> (2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:
>
> (a) whether there was a meeting under section 11 or 13(a) [(a Mediation Meeting or Settlement Conference)];
>
> (b) whether interim costs were awarded;
>
> (c) whether an oral hearing was held in the course of the appeal;
>
> (d) whether the application for costs was filed with the appropriate information;
>
> (e) whether the party applying for costs required financial resources to make an appropriate submission;
>
> (f) whether the submission of the party made a substantial contribution to the appeal;
>
> (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
>
> (h) any further criteria the Board considers appropriate.
>
> (3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of
>
> (a) any other party to the appeal that the Board may direct;
>
> (b) the Board.
>
> (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[34] The legislation provides the Board discretion to use any of the above factors. Surely, the weight given to each of the criteria is also up to the Board and will turn on the particular circumstances of each appeal. In *Cabre*, Mr. Justice Fraser noted that section "…20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to

award costs…" and concluded "…that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[26]

B. Courts vs. Administrative Tribunals

[35] In applying these costs provisions, it is important to remember the difference between the Board the Courts. The Courts generally apply a "loser-pays" principle. There is a distinct difference between costs associated with judicial civil litigation and costs awarded an environmental forum such as the Environmental Appeal Board. The basis of this difference is the considerable public interest considerations that competing multi-party administrative tribunals are required to undertake when making decisions or recommendations.[27] The outcome before the Board is not solely or even mainly a matter of making a determination of a dispute between two parties. This distinction was noted in *Bell Canada*:[28]

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given in its ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the

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[26] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

[27] See section 2 of the Act. The case before the Board provides a clear example of how the public interest is taken into account. In the Board's Report and Recommendations it stated:

> "We also reject the various proposals of the Appellants, and in particular that of Mr. Kravinchuk, because they do not take into account the economic impact on the people of Alberta. The Wabamun Power Plant provides power to 500,000 people. [(TransAlta's Written Submission, dated April 11, 2001, page 1.)] The three TransAlta generating facilities at Lake Wabamun represent 43 percent of Alberta's generating capacity. [(Hearing Transcript, page 422.)] The Wabamun Power Plant alone represents approximately 7.4 percent of Alberta's generating capacity. [(Calculation based on information at page 20 of TranAlta's Annual Report entitled TransForms, attached as appendix to Mr. Paron's Written Submission, dated April 11, 2001. Exhibit #4.)] The Act requires, in section 2, that there is a balance. TransAlta's recommended provisions provide this balance."

In the case before it, none of the parties were, *per se*, representing the 500,000 consumers that obtain their power from the Wabamun Power Plant.

[28] *Bell Canada* v. *C.R.T.C.,* [1984] 1 F.C. 79 (Fed. C.A). See also: Macaulay's *Practice and Procedure Before Administrative Tribunals*, at page 8-1, where he attempts to

> "…express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

> litigation in which he has been involved and in which he has been adjudged to have a been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before the regulatory tribunals."[29]

[36] The effect of this public interest requirement was also discussed by Mr. Justice Fraser in *Cabre*:

> "…administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green*, *supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:
>
> > In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right."[30]

[37] In the Board's view the Act and the Regulation reflects the idea that the "loser-pays" principle is not generally to be applied by the Board, or if it is applied, it is not the main concern. As stated in *Mizera*:[31]

> "Section 88 [(now 96)] of the Act, and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general

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[29] *Bell Canada* v. *C.R.T.C.,* [1984] 1 F.C. 79 (Fed. C.A).

[30] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 32.

[31] Costs Decision re: *Mizera, Glombick, Fenske, et al.* (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C.

> principle that the loser pays, as outlined in *Reese*. [*Reese* v. *Alberta (Minister of Forestry, Lands and Wildlife*) (1992), 5 Alta. L.R. (3d) 40 (Alta. Q.B.).]"[32]

[38] The Board has generally accepted the starting point that the costs incurred with respect to the appeal are the responsibility of the individual parties.

C. Criteria to be Considered

[39] With this starting point in mind, the Board evaluates each costs application against the criteria in the Act and the Regulation.

[40] As indicated earlier, under section 18(2) of the Regulation, costs awarded by the Board must be "…directly and primarily related to (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are binding.

[41] Beyond this, the Board has some discretion to decide which of the criteria listed in the Act and the Regulations should be applied in a particular claim for costs. The Board determines the relevant weight to be given to each of the criteria, and this determination is fact specific to the particular application.

[42] The Board has noted the particular importance of the contribution to the hearing by the party asking for costs:

> "The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[33]

[43] Further, as indicated by the Board in *Cabre*:

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[32] Costs Decision re: *Mizera, Glombick, Fenske, et al.* (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C at paragraph 9. See also: Costs Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraph 6, and Costs Decision re: *Bernice Kozdrowski* (July 7, 1997), E.A.B. Appeal No. 96-059 at paragraph 21.

[33] Costs Decision re: *Mizera, Glombick, Fenske, et al.* November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C at paragraph 9. See also: Costs Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraph 6, and Costs Decision re: *Bernice Kozdrowski* (July 7, 1999), E.A.B. Appeal No. 96-059 at paragraph 21.

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and present suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
>
> (b) directly related to the matters contained in the Notice of Appeal; and
>
> (c) made a significant and noteworthy contribution to the goals of the Act.
>
> If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or time lost from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[34]

[44] In the case before the Board, virtually all of the costs are legal fees. For this category of expense, except in exceptional cases, the Board has not previously assessed costs awards on a full solicitor and client basis.[35] Where the Board awards legal costs, the Board will generally base the costs awards on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board applies under the Act and the Regulation for that case.

D. Village of Wabamun

[45] The Village of Wabamun has requested a total of $19,503.95 in costs. All of these costs were legal fees, with $17,418.75 for professional fees, $809.24 for disbursements and other charges (the details of which were not specified), and $1,275.96 in GST. In support of its request for cost, the Village of Wabamun has provided two invoices from its legal counsel. The first was dated March 26, 2001, and is in the amount of $10,452.84, with $9,243.75 of that being for professional fees. The second was dated April 27, 2001, and is in the amount of $9,051.11, with $8,175.00 of that being for professional fees.

[46] It is the Board's understanding that the first invoice related to the participation of the Village of Wabamun in the preliminary meeting of March 1, 2001.[36] While no specifics are

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[34] Costs Decision re: *Cabre Exploration Ltd*. (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraph 9.

[35] Costs Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraph 11.

[36] Written Submission of the Village of Wabamun dated April 11, 2001 at paragraph 35, which states: "…the Village incurred legal costs in the approximate amount of $10,450.00 for the preparation of both written submissions and the presentation of the Village's submission at the Preliminary Meeting."

provided, it is the Board's understanding that this fee was for the preparation of the written submission for the preliminary meeting and legal counsel's attendance at the preliminary meeting. By implication, the second invoice would relate to the participation of the Village of Wabamun at the hearing on April 18 and 19, 2001. Again, while no specifics are provided, it is the Board's understanding that this fee was solely for the preparation of the written submission for the hearing. The Board notes that legal counsel for the Village of Wabamun did not attend the hearing.[37]

[47] The basis of its request for their costs was that the Village felt compelled to retain legal counsel to assist them because they were not considered directly affected in the previous hearing, the issues to be addressed were complex, and they needed to respond to submissions by other legal counsel. Significantly, the Board notes that no information had been provided with respect to the financial need of the Village of Wabamun in accordance with section 20(2)(e) of the Regulation.

[48] Further, the Village of Wabamun indicated that they felt they contributed to the hearing by identifying that the views of the other Appellants were not shared by a large number of local residents; that the Village provided information regarding the potential dangers of open ice; that there are health concerns regarding the proposals of the other Appellants respecting weed control; and that there were potential economic impacts of this Approval on the Village.

[49] Subject to the comments respecting LWEPA below, while the Board is of the view that the Village of Wabamun provided some assistance, the Board is also of the view that this assistance was consistent with that of the other parties and therefore, does not warrant an award of costs pursuant to section 20(2)(f) of the Regulation. The assistance that the Village of Wabamun provided to the Board was principally to present factual information and did not *per se* contribute to the furtherance of the general public interest or to a clearer understanding of the interpretation of the Act vis-a-vis these appeals.

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[37] To fully understand the nature of this claim for costs, it would have been helpful to know the number of hours billed by legal counsel. Unfortunately, this information was not provided. In the Board's estimation, given the nature of the professional fees, legal counsel for the Village of Wabamun would have spent between 46 and 49 hours with respect to the preliminary meeting and between 40 and 43 hours with respect to the hearing. The Board computes the number of hours based on an hourly rate between $190 and $200 per hour. $190 per hour is the maximum hourly rate the Government of Alberta would likely pay for senior outside counsel based on its tariff of fees. $200 per hour is the hourly rate that Mr. Paron's legal counsel has charged in his invoice.

[50] The Board has no doubt that, as a municipality, the Village of Wabamun has an interest in the Wabamun Power Plant. As noted by the Board, the Village is a directly affected landowner, the "…Wabamun Power Plant is located within the Village of Wabamun, TransAlta employs many of its citizens, and the Village derives a sizable portion of its tax base from TransAlta."[38]

[51] However, in this regard, as noted in the Board's Report and Recommendations, the Village of Wabamun "… expressed its view on only two of the six issues before the Board."[39] The first issue was the alternative technologies for dealing with weeds, where the Village's principle concern was protecting their water supply from the potential use of herbicides. The second issue was the timing of the potential decommissioning of the Wabamun Power Plant, which the Village of Wabamun sought to delay in order to shield itself from the related economic impacts.[40]

[52] All things considered, it is appropriate that the Village of Wabamun should bear its own costs.

E. Mr. Paron

[53] Mr. Paron has requested a total of $26,196.27 in costs. All of these costs were legal fees, with $23,900.00 for professional fees, $582.59 for disbursements and other charges (long distance charges, courier charges, copies and faxes), and $1,713.78 in GST. The invoice from Mr. Paron's legal counsel provided few supporting details. It indicated that 119.5 hours were spent with respect to the appeal, which implies a rate of $200 per hour. No indication is provided as to what portion of this 119.5 hours was spent on the preliminary meeting and what portion was spent on the hearing.

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[38] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 110.

[39] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 111.

[40] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 111.

[54] No section 2 arguments or other regulatory arguments were presented as to why Mr. Paron should be awarded costs. As a result, the Board has insufficient information on which to base a costs award.[41]

[55] Further, subject to the comments respecting LWEPA below, while the Board is of the view that Mr. Paron provided some assistance, the Board is also of the view that this assistance was consistent with that of the other parties and therefore, does not warrant an award of costs in accordance with section 20(2)(f) of the Regulation.

[56] Further, in its Report and Recommendations, the Board noted the extensive public consultation that was undertaken by the Director and TransAlta.[42] It is the Board's understanding, based on the submission on costs of TransAlta, that Mr. Paron did not participate in this public consultation process. In section 20(2)(a) of the Regulation, the Board is directed to consider whether a Mediation Meeting or Settlement Conference has been held. The intent of this provision is to encourage participation in alternate methods of dispute resolution, which tend on balance to be more cost effective than a full hearing process. It logically flows, pursuant to section 20(2)(h), that participation in consultation processes prior to the Approval can be relevant to the Board's consideration of costs.

[57] Finally, in the Board's view, the submissions of Mr. Paron were not consistent with the fuller public interest. In the Board's Report and Recommendations, the Board noted:

> "We also reject the various proposals of the Appellants, and in particular that of Mr. Kravinchuk [(Mr. Paron's legal counsel)], because they do not take into account the economic impact on the people of Alberta. The Wabamun Power Plant provides power to 500,000 people. [(TransAlta's Written Submission, dated April 11, 2001, page 1.)] The three TransAlta generating facilities at Lake Wabamun represent 43 percent of Alberta's generating capacity. [(Hearing Transcript, page 422.)] The Wabamun Power Plant alone represents approximately 7.4 percent of Alberta's generating capacity. [(Calculation based on information at page 20 of TranAlta's Annual Report entitled TransForms, attached as appendix to Mr. Paron's Written Submission, dated April 11, 2001.

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41 See section 20(2)(d) of the Regulation.

42 *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 129.

> Exhibit #4.)] The Act requires, in section 2, that there is a balance. TransAlta's recommended provisions provide this balance." [43]

As a result, the Board is of the view that an award of costs to Mr. Paron would be inappropriate.

F. LWEPA

[58] LWEPA has requested a total of $5,079.25 in costs. The vast majority ($5000.00) of these costs were legal fees, with $4,012.70 for professional fees, $660.20 in disbursements and other charges (long distance charges, courier charges, copies, faxes, and travel expenses), and $327.10 in GST. In addition to legal fees, LEWPA had also requested $79.25 in other expenses (copies, courier charges, and search charges). These additional expenses appear to relate to completing the preparation of a submission. Of particular importance is that this costs request relates solely to LWEPA's participation at the preliminary meeting.

[59] In support of their request for costs, LWEPA indicated that the costs were incurred as a result of the timing of the preliminary meeting, which necessitated retaining legal counsel. LWEPA indicated that they are directly affected by the decision under appeal, that the costs being claimed are reasonably related to the preliminary meeting and included the preparation and presentation of LWEPA's concerns at the preliminary meeting, that the intervention of LWEPA raised matters of broad public interest and concern, that LWEPA has contributed information that was not otherwise brought to the attention of the Board. In fact, the Board relied on this information in rendering its March 1, 2001 Decision. LWEPA also indicate that their members have contributed over 1000 hours of volunteer time to participate in the regulatory process that had gone into the issuance of the Approval. LWEPA has proven to our satisfaction that as an organization, their resources are limited. In support of their application for costs, they provided a detailed legal bill and copies of invoices and receipts.

[60] As indicated in the Board's decision letter, the Board has decided to award costs in the amount of $5079.25 to LWEPA. In the Board's view, the costs requested by LWEPA are in keeping with section 18(2) of the Regulation: they are (1) reasonable, (2) directly and

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[43] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 104.

primarily related to the matters contained in the Notice of Appeal, and (3) directly and reasonably support the preparation and presentation of the party's submission.

[61] The principle reason for LWEPA's successful costs request is the significant assistance that LWEPA – and more specifically LWEPA's legal counsel, Mr. Brian O'Ferrall, Q.C. – gave the Board with respect to the preliminary meeting. Mr. O'Ferrall made two significant and unique contributions to the preliminary meeting. The Board relied upon these contributions. First, Mr. O'Ferrall made a substantial contribution to the interpretation of Act with respect to standing. As stated in the March 13, 2001 Decision:

> "The Board is also persuaded by another argument advanced by Mr. O'Ferrall. Mr. O'Ferrall described for the Board that LWEPA is "… a whole bunch of people that have taken part in the consultative process and there are some decisions made as a result of that." [Closing Comments of Mr. O'Ferrall on behalf of LWEPA, Preliminary Meeting Transcript, page 176.] What Mr. O'Ferrall described in essence was that LWEPA was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which the [sic.] many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process. [See section 2(f) of the Act.] As a result, even if the Board did not have the Notices of Appeal from Mr. Doull and Mr. Paron before it, the Board believes that LWEPA is a proper party to these proceedings."[44]

[62] Second, Mr. O'Ferrall made a significant contribution to the hearing by providing the Board with a thorough and detailed understanding of the participation of the Appellant Enmax in the Energy and Utilities Board process associated with the deregulation of the interest. This information, which goes to our Board's jurisdiction, formed in part, the basis of the Board's decision to dismiss Enmax's appeal. Specifically, in the March 13, 2001 Decision, the Board stated:

> "The Board is persuaded by Mr. O'Ferrall's explanation of the process by which the PPAs [(Power Purchase Arrangements)] were developed before the AEUB. In his closing arguments [Closing Submission by Mr. Brian O'Ferrall on behalf of LWEPA, Preliminary Meeting Transcript, pages 171 to 180)] Mr. O'Ferrall explained, in some detail, the process whereby Enmax had an opportunity to participate in a hearing or review by the AEUB under the *Electrical Utilities Act*, S.A. 1995, c. E-5.5 (the "EUA") and its relevance to our Act.

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[44] Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom.* Bailey *et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

> Mr. O'Ferrall explained how the EUA established an "Independent Assessment Team" which reviewed, among other facilities, the Wabamun Power Plant and developed a report reviewing the potential costs identified by TransAlta. The report included a proposed power purchase arrangement – the predecessor to the PPA. The AEUB then published notice advising that it had received this report and held a major hearing into the power deregulation process, that eventually lead to the auctioning of power production of, among others, the Wabamun Power Plant. As stated by Mr. O'Ferrall:
>
> > '…that is a notorious process, it was well know to Enmax. Enmax is a sophisticated electrical consumer for number of years in this Province of Alberta, became a marketer as a result of privitization or deregulation or whatever you want to call it of our power industry, and knew full well what it was getting into.' [Closing Submission by Mr. Brian O'Ferrall on behalf of LWEPA, Preliminary Meeting Transcript, page 175.]
>
> Finally, as Mr. O'Ferrall stated, 'Enmax's issue ought not to be heard by the Board because what the Board is being asked to decide is to be decided or has been decided by another regulatory scheme.' [Closing Submission by Mr. Brian O'Ferrall on behalf of LWEPA, Preliminary Meeting Transcript, page 171.] The Board agrees with Mr. O'Ferrall. Enmax has had an adequate opportunity to raise similar issues before the AEUB."[45]

[63] The Board also notes the reasonableness of the costs requested by LWEPA. In reviewing the detailed invoice for legal services attached to the costs requests, the Board notes that the total professional fees were $4,012.70. While the number of hours spent is not expressly indicated, in the Board's view this fee indicates that between 20 and 21 hours were billed.[46] In the Board's view, the reasonableness of this bill relates in large part to the considerable background and experience of Mr. O'Ferrall,[47] which was of significant assistance to the Board and which no doubt would be considerably less than Mr. O'Ferrall's normal hourly rate.

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[45] Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraphs 33 to 35, (*sub nom.* Bailey *et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

[46] The Board computes the number of hours based on an hourly rate between $190 and $200 per hour. $190 per hour is the maximum hourly rate the Government of Alberta would likely pay for senior outside counsel based on its tariff of fees. $200 per hour is the hourly rate that Mr. Paron's legal counsel has charged in his invoice. The Board also notes that the preliminary meeting itself was 7 ½ hours.

[47] The Board notes that Mr. Brian O'Ferrall has been in practice for more than 25 years and has appeared extensively before the AEUB. The Board also notes that Mr. O'Ferrall was retained on February 13, 2001 for the preliminary meeting, which took place on March 1, 2001. The invoice provided by Mr. O'Ferrall indicates that he spent no less than two days (February 20, 2001 and February 28, 2001) reviewing the extensive file material and the submissions of the other parties, and another day (February 22, 2001) preparing the submission of LWEPA.

G. Who Should Bear the Costs?

[64] The final question that the Board must answer is "Who should bear the costs awarded to LWEPA." The Board had determined that the appropriate party to bear the costs awarded to LWEPA is Enmax.

[65] Enmax filed a Notice of Appeal with the Board arguing that the conditions included in the Approval should be modified to eliminate or delay upgrades to the Wabamun Power Plant. The purpose of this request was to attempt to avoid the cost of these upgrades from being passed on to Enmax as a result of the requirements of the Power Purchase Arrangement.

[66] LWEPA responded to the Notice of Appeal filed by Enmax by filing a Notice of Appeal of their own – the principle purpose of which was to oppose changes requested by Enmax. The Board understands that LWEPA participated extensively in the public consultation process that proceeded the issuance of the Approval and was seeking to protect the gains that it had made through the process.

[67] As stated by the Board in its Report and Recommendations:

> "In its original Notice of Appeal, LWEPA's main purpose for filing the appeal was to oppose the appeal filed by Enmax. [Hearing Transcript, page 756.] Enmax's appeal was eventually dismissed as per the Board's March 13, 2001 Decision. Essentially, the appeal filed by Enmax sought to delete conditions in the Approval that required TransAlta to upgrade the Wabamun Power Plant. LWEPA wanted to ensure that these provisions were maintained, and generally, LWEPA appeared to support the Approval. In their Notice of Appeal LWEPA stated:
>
> > 'III. The details of the decision which I object to are:
> >
> > The association doesn't have any objection to the decision issue[d] on November 30, 2000, but as a Statement of Concern Filer we have objections to any variation to the terms and conditions that may be made during any appeal.
> >
> > IV. The grounds for this appeal are:
> >
> > Any future variations of any terms and conditions related to the licence issued as at November 30, 2000, specifically related to emissions, standards and return of water to Lake Wabamun via Wabamun Lake Water Treatment Plant.
> >
> > V. The relief which I request is as follows:

> No changes to the conditions outlined in the November 30, 2000 licence without the involvement of Lake Wabamun Enhancement and Protection Association.' [Exhibit 2.]" [48]

Further, the Board stated in its Report and Recommendations that: "In this case, the broad general concern raised by LWEPA was that they wanted to stop the appeal filed by Enmax – they wanted to prevent the agreement reached with the Director regarding the Approval from being changed in the appeal process."[49]

[68] Enmax opposes an award of costs against it. Enmax argues that the Board does not have the jurisdiction to order Enmax to pay costs on the basis that it was found not to be a party in the appeal in the Board's March 13, 2001 Decision. In the alternative, Enmax argues that the Board should not exercise its discretion to award costs, and in the further alternative, Enmax argues that it should not bear these costs alone.

[69] The Board does not agree with Enmax. The argument advanced by Enmax is that it was not a party to the proceedings. In the Board's view this argument is without merit. Enmax was granted co-equal status and participated as a *party* at the preliminary meeting. The fact that Enmax was a party for the purposes of the preliminary meeting was made clear in the Board's letter of February 16, 2001 and in the opening remarks of the Board. In the February 16, 2001 letter, the Board indicated that:

> "For the purpose of this Preliminary Meeting, the Board considers the following to be parties:
>
> - *ENMAX Energy Corporation*
> - Gwen Bailey and the Summer Village of Point Alison
> - David Doull
> - Lake Wabamun Enhancement and Protection Association
> - Nick Zon
> - Blair Carmichael
> - Donna Thomas and the Summer Village of Kapasiwin
> - James Paron

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[48] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 41.

[49] *Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation* (May 18, 2001), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R at paragraph 44.

- Mayor William Purdy and the Summer Village of Wabamun
- Mayor Gordon Wilson and the Summer Village of Point Alison
- TransAlta Utilities Corporation
- Director, Northern East Slopes Region, Alberta Environment."

[Emphasis added.]

Further, in the Board's opening remarks, the Chairman indicated, following the roll call that included Mr. Lou Cusano on behalf of Enmax:

> "We have said that for the purposes of today's hearing we have allowed all of those people whose names I called on the roll call *to be parties* to participate today."[50]

In light of these comments and the letter of February 16, 2001, the characterization of the Chairman's comments as presented in the Enmax submission dated July 5, 2001 seems out of context.[51]

[70] Further, section 96 of the Act provides:

> "The Board may award costs of and incidental to *any proceeding* before it on a final or interim basis and may, in accordance with the regulations, direct *by whom* and to whom any costs are to be paid." [Emphasis added.]

As stated, this provision grants the Board discretion to award costs pursuant to *any* proceeding.

[71] Up until the Board made its March 13, 2001 Decision to dismiss Enmax's appeal, Enmax had an appeal before the Board and had all of the rights and obligations of a party with respect to that appeal. These responsibilities included the possibility that costs would be awarded against them.

[72] Further, in its bid to get full standing, Enmax argued that it acquired the right to appeal by virtue of its interest in the Power Purchase Arrangement, and in the alternative, it acquired the right to appeal because it was analogous to an approval holder – Enmax was arguing that it had an automatic right to appeal because of its interest in the Wabamun Power Plant.[52] In

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[50] Preliminary Meeting Transcript, page 8, lines 6 to 9. See also: Preliminary Meeting Transcript, page 3, lines 23 to 25.

[51] See: Paragraph 27 above. See also: Preliminary Meeting Transcript, pages 40 and 41, lines 25 to 3.

[52] Re: TransAlta Utilities Corp. (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraphs 19 and 27, (sub nom. Bailey *et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re*: TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID. See also, paragraph 29:

> "Enmax is arguing that because of its power purchase arrangement – the PPA – with TransAlta, which may result in the costs of implementing the Approval being passed onto Enmax (which may

the Board's view it is inappropriate to permit a party to advance such arguments in order to win standing in the main part of the appeal and, upon being unsuccessful, then deny that they were a party for the purposes of costs.

[73] Enmax *was* a party for the purpose of the preliminary meeting. LWEPA filed its Notice of Appeal, opposing the Notice of Appeal filed by Enmax, in order to protect the agreement it had reached regarding the Approval with the Director, following the public consultation process. Enmax sought to change this agreement. LWEPA made a significant contribution to the preliminary meeting that, in part, resulted in the Enmax appeal being dismissed. Based on these facts, the Board is of the view that that Enmax should bear the costs of LWEPA, but with respect to the preliminary meeting only.

IV. CONCLUSION

[74] For the reasons provided above, the Board awards costs in the amount of $5,079.25 to LWEPA. These costs shall be paid by Enmax within 30 days of this decision.

[75] For the reasons provided above, the Board has decided not to award costs to the Village of Wabamun or Mr. Paron.

Dated on February 8, 2002, at Edmonton, Alberta.

"original signed by"

William A. Tilleman, Q.C.

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be true), Enmax will suffer the burden of, and therefore must have the corresponding benefit of, the Approval Holder's right to appeal or so the argument goes."