

DECISION

NSUARB-GO-11-01  
NSUARB-GO-11-02  
2011 NSUARB 181

**NOVA SCOTIA UTILITY AND REVIEW BOARD**

**IN THE MATTER OF THE PETROLEUM PRODUCTS PRICING ACT  
AND REGULATIONS**

**- and -**

**IN THE MATTER OF AN APPLICATION by 3067500 NOVA SCOTIA LIMITED** pursuant to s. 24(1) of the *Petroleum Products Pricing Regulations* requesting an increase of 1.0 cent per litre on both minimum and maximum self-service mark-ups and an increase of 2.5 cents per litre on the minimum full-service mark-up

**- and -**

**IN THE MATTER OF AN APPLICATION by IRVING OIL MARKETING G.P.** pursuant to s. 24(1) of the *Petroleum Products Pricing Regulations* requesting an increase in the transportation allowance

**BEFORE:** Roland A. Deveau, Q.C., Acting Vice-Chair  
Murray E. Doehler, CA, P. Eng., Member  
Roberta J. Clarke, Q.C., Member

**APPLICANTS:** **3067500 NOVA SCOTIA LIMITED**  
Graham Conrad  
Wayne Pace  
Roy McNeil

**IRVING OIL MARKETING G.P.**  
David S. MacDougall, LL.B.  
James A. MacDuff, LL.B.

**INTERVENORS:** **CONSUMER ADVOCATE**  
David J. Roberts, LL.B.

**ATLANTIC CONVENIENCE STORES ASSOCIATION**  
Robert G. Grant, Q.C.  
Mike Hammoud

**LEQUILLE COUNTRY STORE LTD.**  
Daniel B. Ritchie

**TIDNISH GENERAL STORE LTD.**  
Richard Plett

**SERVICE NOVA SCOTIA AND MUNICIPAL RELATIONS**  
Maggie MacDonald

**BOARD COUNSEL:** S. Bruce Outhouse, Q.C.  
Richard Melanson, LL.B.

**BOARD CONSULTANT:** Michael Gardner, M.A., LL.B.  
Gardner Pinfold Consultants Inc.

**HEARING DATE:** September 14, 2011

**FINAL SUBMISSIONS:** October 14, 2011

**DECISION DATE:** November 23, 2011

**DECISION:** (1) Application for increase in retail mark-ups approved in part; minimum self-service and full-service mark-ups increased by 0.8 cpl and the maximum self-service mark-up increased by 1.1 cpl.

(2) Application for increases to transportation allowances approved in full, except that the request for a FAM is denied.

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## 1.0 INTRODUCTION

[1] In 2005, the Province of Nova Scotia (the "Province") enacted the *Petroleum Products Pricing Act*, S.N.S. 2005, c.11 (the "Act"), permitting regulation, with certain exceptions, of the price of gasoline and diesel oil ("regulated petroleum products"). For simplicity, this type of regulation will be referred to in this Decision as "gasoline pricing regulation" as the context requires. While the statute was enacted in 2005, gasoline pricing regulation did not actually take effect in the Province until July 1, 2006. Gasoline pricing regulation was administered by a department of the Provincial Government, Service Nova Scotia and Municipal Relations ("SNSMR"), and its Minister, until September 30, 2009.

[2] Effective October 1, 2009, the *Petroleum Products Pricing Regulations* (the "Regulations") were amended to transfer gasoline pricing regulation to the Nova Scotia Utility and Review Board (the "Board").

[3] On February 22, 2011, a letter of application was received by the Board from Wayne Pace, owner/manager of 3067500 Nova Scotia Limited, operating as Tantallon Esso, 4 French Village Station Road, Upper Tantallon, Nova Scotia, requesting the Board to increase the minimum and maximum self-service mark-ups by 1 cent a litre ("cpl") and the minimum full-service mark-up by 2.5 cpl (the "Retail Margin Application"). The Board notes here that the word "margin" will be used interchangeably with "mark-up" in this Decision. In his letter, Mr. Pace also requested that the Retail Gasoline Dealers Association of Nova Scotia ("RGDA"), an entity that submitted evidence to the Board earlier, be permitted to conduct the Retail Margin Application on his behalf.

[4] On April 6, 2011, a Notice of Hearing was issued advising that the Board would conduct a hearing regarding the Retail Margin Application.

[5] On May 26, 2011, Irving Oil Marketing G.P. ("Irving"), a formal intervenor on the Retail Margin Application, also applied to the Board requesting an increase in the transportation allowance, referred to as transportation adjustments in the *Regulations* (the "Transportation Allowance Application").

[6] The Board determined that both the Retail Margin Application and the Transportation Allowance Application should be heard jointly.

[7] The purpose of regulating gasoline prices is outlined in the *Regulations*:

2 The purpose of these regulations is to ensure just and reasonable prices for specified petroleum products, taking into consideration all of the following objectives:

- (a) preserving availability of specified petroleum products in rural areas;
- (b) stabilizing prices of specified petroleum products;
- (c) minimizing the variances in prices of specified petroleum products across the Province.

[8] Among other powers and duties assigned to the Board, the *Regulations* provide:

17(1) For each type of petroleum product, the fixed wholesale price in a zone is the sum of all of the following:

- (a) the current benchmark price as prescribed by the Board under Section 16;
- (b) the wholesale margin as calculated by the Board in accordance with subsection (4);
- (c) all taxes, excluding the taxes imposed under subsections 165(1) and 165(2) of the Excise Tax Act (Canada);
- (d) if the Board considers it appropriate, transportation adjustments and forward averaging corrections.

**Maximum and minimum retail mark-up**

**18 (1)** When prescribing the minimum and maximum retail mark-ups for a type of petroleum product in a zone, the Board may consider any factors the Board considers relevant, including any of the following:

- (a) the retail mark-ups within the Province or a zone for the type of petroleum product, excluding taxes imposed under subsections 165(1) and 165(2) of the Excise Tax Act (Canada), over a period of time that the Board considers appropriate;
- (b) whether the retail mark-ups identified under clause (a) are just and reasonable, taking into account any of the following:
  - (i) the distance from a refinery gate to the boundaries of the zone,
  - (ii) the volume of petroleum product sold to consumers during the period,
  - (iii) innovations within the industry;
- (c) whether the petroleum product is sold or purchased at a full-service retail outlet or a self-service retail outlet;
- (d) whether the minimum retail mark-up will preserve the viability of markets affected by their proximity to the provincial border.

**(2)** The minimum and maximum retail mark-ups must be expressed in Canadian cents per litre to the nearest one-tenth of a cent or another unit of measurement appropriate to the petroleum product.

...

**Public hearings by Board**

**22(1)** The Board is hereby designated under subsection [clause] 14(1)(g) of the Act to conduct public hearings respecting any matter within its jurisdiction under these regulations, including any of the following:

- (a) dividing the Province into zones;
- (b) fixing wholesale prices, maximum retail prices and minimum and maximum retail mark-ups set under these regulations; ...

...

**Investigations by Board to ensure matters just and reasonable**

**24(1)** With or without notice, the Board may on its own motion investigate whether any matter within its jurisdiction under these regulations is just and reasonable, including any of the following matters:

- (a) the boundaries of the zones;
- (b) the fixed wholesale prices;
- (c) the maximum retail prices;
- (d) the minimum and maximum retail mark-ups.

**(2)** On application by any of the following, the Board must carry out an investigation under subsection (1):

- (a) a retailer, wholesaler or wholesaler-retailer;
- (b) any 5 persons, firms or corporations;
- (c) the Minister.

(3) Following an investigation, the Board may make any order it considers necessary to ensure any matter within its jurisdiction under these regulations is just and reasonable, but no order may be made by the Board until a public hearing or inquiry is held in respect of the matter.

## 2.0 BACKGROUND

[9] When the Province reintroduced gasoline pricing regulation on July 1, 2006, it established regulated retail margins for self-service [minimum of 4.0 cpl and maximum of 5.5 cpl] and full-service [minimum of 4.0 cpl and maximum of 7.5 cpl] and transportation allowances by zones. These margins and allowances were reviewed by the Board in its decision on October 16, 2006 (2006 NSUARB 108). Based on a review by Gardner Pinfold, its consultant at the time, the Province eliminated the maximum mark-up for full-service in 2007.

[10] Regulated margins in the other Atlantic provinces have changed as follows:

a. **Self-serve:** the regulated margin in PEI increased in two stages in 2008, with the minimum rising from 4.0 to 4.5 cpl, and the maximum rising from [5.5 to 6.5 cpl]. In Newfoundland and Labrador, the maximum margin increased from 5.0 to 6.25 cpl. Rising costs were cited by the regulators as the reason for the increases. The regulated margin in New Brunswick was adjusted on June 28, 2011, with the maximum retail margin rising from 5.0 to 5.9 cpl. The regulated margin in Nova Scotia remains unchanged since it was introduced in July 2006.

b. **Full-serve:** the regulated margin in PEI increased in two stages in 2008, with the minimum rising from 5.0 to 6.5 cpl, and the maximum rising from [7.5 to 9.5 cpl]. In Newfoundland and Labrador, the maximum margin increased from 7.6 to 8.85 cpl. Rising costs were cited by the regulators as the reason for the increases. The regulated margin in New Brunswick was adjusted on June 28, 2011 with the maximum margin rising from 7.5 to 8.9 cpl. The cap on the full serve margin was effectively removed in Nova Scotia in 2007.

[Gardner Report, p. 1]

[11] Since 2007, no applications for margin or transportation allowance increases have been received by the Board. Consequently, the regulated retail margins and transportation allowances by zone have not changed.

[12] In the Retail Margin Application, the RGDA argues that rising costs since 2006:

...are now creating serious challenges to the economic viability of retailing gasoline throughout the province... Higher costs of business from minimum wage increases, rising product costs, credit card costs, utilities, and more make it necessary for retailers to generate more margin from gasoline sales in order to survive...

[Exhibit T-2, p. 7]

### **3.0 PROCEEDINGS AND FORMAL INTERVENORS**

[13] By Hearing Order issued on April 1, 2011, the Board directed that a hearing be conducted respecting the Retail Margin Application, establishing a timeline for the filing of requests for formal standing, the filing of evidence and information requests ("IRs"), the filing of letters of comment by the public and requests to speak at the evening session, and the scheduling of the hearing.

[14] The Notice of Public Hearing was published in the Chronicle Herald and the Cape Breton Post on April 9, April 12, April 16 and August 2, 2011; and the Truro Daily News, the New Glasgow Daily News and the Amherst Daily News on April 13, 2011.

[15] A total of six Formal Intervenors responded to the Board's Notice of Public Hearing, including the Consumer Advocate ("CA"); Irving; Atlantic Convenience Stores Association ("Atlantic"); Service Nova Scotia and Municipal Relations ("SNSMR"); Daniel Ritchie of Lequille Country Store; and Richard Plett of Tidnish General Store Ltd.

[16] On May 12, 2011, following submissions from the Intervenors, the Board issued a Final Issues List which specifically identified those matters which would be the focus of the public hearing.

[17] On May 26, 2011, Irving submitted the Transportation Allowance Application. The Board decided to hear this application jointly with the Retail Margin Application, and issued a Hearing Order to revise the timeline. The revised Notice of Public Hearing was published in the Chronicle Herald and the Cape Breton Post on June 18 and August 2, 2011; and the Truro Daily News, the New Glasgow Daily News and the Amherst Daily News on June 22, 2011.

[18] At the hearing held on September 14, 2011, Graham Conrad, Executive Director of the RGDA, presented the Retail Margin Application. He was accompanied by Wayne Pace and Roy McNeil, Board members of the RGDA, who also testified in support of the application. The Board also heard evidence from Mr. Plett and Mr. Ritchie, who both sell gasoline to the motoring public.

[19] Irving's evidence related to the Transportation Allowance Application was provided by Matt Holland, its petroleum manager.

[20] Michael Gardner, M.A., LL.B., a principal of Gardner Pinfold Consultants Inc., appeared as an expert witness on behalf of Board Counsel. He was qualified by the Board to provide opinion evidence as an economist, providing testimony on gasoline pricing and related matters. The Gardner Report was filed as an exhibit at the hearing.

## 4.0 ISSUES

[21] Pursuant to the Final Issues List that applied to this proceeding, the Board considers that the issues that must be addressed in this Decision are as follows:

1. Should there be an increase in the minimum and/or the maximum retail mark-ups? If so, by what amount?
2. Should the minimum and maximum retail mark-up vary by zone (exclusive of the transportation allowance)?
3. Should there be a difference in the minimum retail mark-up between full-service and self-service. If so, what should it be?
4. Should there be a maximum retail mark-up for full-service?
5. Should the transportation allowance be increased in any or all of the zones? If so, by what amount?

## 5.0 ANALYSIS AND FINDINGS

### 5.1 Should there be an increase in the minimum and/or the maximum retail mark-ups? If so, by what amount?

[22] The RGDA cited significant cost increases in the retail gas industry, which prompted the Retail Margin Application. It focused on three main cost categories: wages, credit card fees, and utilities, explaining:

Every retailer in the province has been equally impacted by increases in minimum wages, credit card cost and utilities. Since 2006 almost all other operating expenses have increased as well however, the impacts from other operating expense increases vary by retailer. For this exercise we will focus on the 3 main operating expense lines, as mentioned because combined they can normally represent about 60-70% of the total cost of doing business.

[Exhibit T-2, p. 6]

[23] Direct evidence submitted by the RGDA (Exhibit T-2, p. 10) described the need for a margin increase of 0.42 cpl, due to an increase of 35% in minimum wages from 2005 to 2010. It said that a further increase of 0.17 cpl is needed due to the increase in credit card fees (Exhibit T-2, p. 14).

[24] The RGDA further stated that utility costs, a category that it claims accounts for 0.43 cents out of the current 4.0 cent minimum margin, had increased by 26.1% from 2006 (Exhibit T-2, p. 15).

[25] The RGDA did not specify how much other expenses have increased. At the hearing, Mr. Conrad testified:

... Since 2006, almost all other operating costs have increased as well, but those impacts vary – those expenses vary retailer by retailer depending on their circumstances.

[Transcript, p. 21]

[26] Mr. Conrad went on to suggest that the “other” expenses amounted to an average of 3 cpl in 2010.

[27] The RGDA presented data on the average volume per station, which has increased from 2.335 million in 2005 to 2.888 million litres in 2010 (Exhibit T-2, p. 32). However, any efficiencies gained with this 23.7% increase in average volume were not taken into account in the Retail Margin Application. In its response to Board IRs, the RGDA stated:

The information on Appendix C of our application is included to give insight into the devolution of the number of retail outlets county by county throughout the province. The significance of this information and the growth of per volume thru put is intended to provide some Industry perspective on trends during the period 1995 – 2010 which will be impacted by the outcome of our application. ...

[Exhibit T-9, IR-6, p. 8]

[28] During an exchange at the hearing between Board Counsel and Mr. Conrad, the impact of volume increase on margins was discussed:

Q. ... with respect to the declining number of stations over a period of time, and including from 2006 through to present, but, as a general proposition, ... wouldn't an increase in volume or gasoline sales by lesser stations mean that you need less of an increase in margin than the entire amount of the cost increase?

A. You're absolutely right ....

[Transcript, p. 65]

[29] The RGDA witness panel confirmed that retailers generally operate a “non-petroleum” business along with the sale of petroleum products. Mr. McNeil testified that the other areas of his business have been supporting the sale of gas over recent years. This phenomenon was confirmed by both Mr. Pace and Mr. Conrad in response to questions from the Board.

[30] As further support for this, Mr. Ritchie described the sale of gas as “a service we’re offering” (Transcript, p. 141) and said “...we’re a community service...” (Transcript, p. 143).

[31] In reply to questions from the CA, Mr. Conrad said that if retailers did not have those ancillary businesses, they would go out of business.

[32] Mr. Gardner also confirmed that the non-petroleum portion of the business generally provides a greater margin to retailers.

[33] The CA suggested that the majority of retailers adopt a price at the minimum end of the regulated mark-up range, and questioned why the 1.5 cpl margin spread was not used to cover the increased costs. The following exchange addressed this:

Q. Just so I understand what you're saying that if you -- if a particular retailer used the margin to increase their price but the other person down the road didn't, you're at a competitive disadvantage and you're going to be driven out of business, that's your concern?

A. (Conrad) Yeah.

Q. So you've got to raise the floor for everybody?

A. (Conrad) Yeah.

[Transcript, p. 50]

[34] In its response to Board IR-8, the RGDA had addressed this issue:

The demographics of the motoring public gasoline purchases are weighted heavily in urban versus rural areas. A variety of different kinds of competition as well as promotions encourages rural consumers to urban markets.

Larger volume retail outlets, especially those with ancillary promotions operate on different economies of scale than do smaller outlets thereby enabling higher volume outlets to sell at minimum margin levels.

Retailers outside these highly competitive "hot spots" are generally lower volume however still essential to the smaller communities around the province in terms of gasoline and service availability, tourism, employment and they must price at maximum levels to survive.

[Exhibit T-9, p. 10]

[35] Mr. Plett indicated that he believed the minimum margin did not need to be increased because the existing spread between the minimum and maximum could be used. In response to the CA, he described his desire to have the minimum mark-up eliminated to allow him to be more competitive with New Brunswick outlets near Tidnish.

[36] Mr. Ritchie explained in response to the CA why he does not use the existing spread to offset increasing costs:

A. Again, being - - well, not just a rural area but maybe I know more customers than an urban site would know. We do have competitors and larger stores where people go shopping and so forth. We feel to keep our loyalty in our customers that we have to match the prices of those larger sites, and people will travel for one and two cents a litre.

So, to keep our customers - - they're very happy that we keep the same pricing as the bigger guys and in return they support us, so it's basically a business decision to keep business.

[Transcript, p. 132]

[37] The CA also pursued this issue with Mr. Gardner who opined that relying solely on the spread would create an unfair competitive environment for some retailers where certain competitors would be pushing the price down.

[38] The CA challenged the data produced by the RGDA as well as the data on which the Gardner Report was based. His concerns were twofold: the limited sources of the data in each case; and, whether there was an appropriate allocation of costs between the petroleum and non-petroleum businesses.

[39] The RGDA provided information from 20 stations operated by its members. Mr. Conrad testified that the stations represented 16 counties, and that they

had attempted to get a cross-section of retailers. He acknowledged that they had not sought representations from a variety of corporate stations, and independents, which either "opted in" or "out" from regulation (as permitted under *Regulation 6*, a retailer who is a party to a contract with a wholesaler, may "opt out" of the *Regulations* with respect to the wholesale price and retail mark-up of a petroleum product).

[40] The evidence of Mr. McNeil and Mr. Pace was that the responses to the RGDA requests for information were based on the petroleum portion of their business. This was confirmed by Mr. Conrad.

[41] Mr. Gardner explained that while the data compiled in his revised Table 5 (Undertaking U-2), which included a number of late responses from retailers to his survey, was not from a random selection of possible respondents and did not represent a "statistically significant number of observations"; nevertheless, it was broadly representative of the industry. He noted in response to questions from Mr. MacDougall that, while his evidence was not similar to that of the RGDA, the impact he found was similar to its conclusions. He also noted that his findings were generally consistent with his findings in a recent similar hearing in New Brunswick where, statistically, responses were roughly the same.

[42] Irving agreed that, due to general cost increases, there is a need to increase margins:

[Irving] believes that the record in the proceeding is clear that there should be an increase in the minimum and maximum retail mark-ups. Exhibit T-2, the Application and supporting evidence of 3067500, on behalf of itself as the Applicant and the Retail Gasoline Dealers Association of Nova Scotia ("RGDA"), clearly demonstrates an increase in the cost of business for retail gasoline dealers since the onset of petroleum products regulation in 2006. As there has not been an increase in the minimum or maximum retail margins since 2006, this increase in costs has eroded the effective margin available to retail gasoline dealers. The passage of a period of 5 years, and the evidence of increasing costs to run a retail gasoline outlet during that time period,

strongly suggest that now is the appropriate time to increase the minimum and maximum retail mark-ups.

[Irving Closing Submission, p. 2]

[43] Irving also stressed how an increase would help to further the objectives of regulation:

Regulation 2 provides that the purpose of the Regulations is to ensure just and reasonable prices for specified petroleum products, taking into consideration each of the objectives set out in subsections (a)-(c). As such, the primary purpose of the Regulations is to "ensure just and reasonable prices for specified petroleum products". In that regard, [Irving] believes that it is only "just and reasonable" that the specified retail minimum and maximum mark-up keep pace with cost increases which are eroding the margin. Clearly ensuring a minimum mark-up that is not eroded by cost increases over the past five years will assist in preserving the availability of specified petroleum products in rural areas, as specifically noted in Regulation 2(a). As rural dealers have less of an ability to benefit from larger volume, it is important that their minimum mark-up provides them with an ability to at least cover their costs.

[Irving Closing Submission, p. 6]

[44] While Mr. Plett suggested that minimum margins should be lowered and ultimately removed to allow stations near the provincial border with New Brunswick to be able to compete, and increase sales of non-petroleum services or products, he agreed that the maximum margins should be increased and may actually be needed in Zone 3 (i.e., the southwestern end of Nova Scotia).

[45] Mr. Ritchie said in his opening statement that he supported the increases proposed by the RGDA.

[46] Mr. Grant stated that Atlantic supports the RGDA position.

[47] Evidence presented by Mr. Gardner showed that costs for retail gasoline dealers on average have increased since 2006, the year in which gasoline regulation was re-introduced in Nova Scotia. The Gardner Report also showed that margins in other regulated provinces have been increased (Newfoundland in 2007, Prince Edward Island in 2008 and New Brunswick in 2011) and that margins in unregulated

jurisdictions have increased significantly over that period of time, which could be, in part, due to the increase in costs. The Report concluded:

The data indicate that rising costs have eroded the retail margin established when regulation was introduced in July 2006. Table 5 shows rising costs have eroded the margin by 0.83 to 1.14 cpl.

[Exhibit T-21, p. 13]

[48] The revised Table 5 showed a slight difference in the impact, being 0.81 cpl to 1.11 cpl.

[49] The Gardner Report recommends an increase in margins be granted, based on its analysis, which is described as "broadly indicative" of the industry as a whole.

[50] The CA suggested that the Board should not grant the increase requested by the RGDA:

The Consumer Advocate submits the Board should not grant the increase in the retail margin for self service gasoline that has been requested by the Applicants. The evidence before the Board is insufficient to support the proposed increase. It is not clear how the proposed increase would benefit the retail gasoline sector. The only thing that is certain is that if the retail margin is increased as proposed, all consumers will pay at least one cent a litre more for gasoline. Given the rapid increase in gasoline costs as a result of global forces beyond the control of the Board, there must be substantial justification for a regulatory decision which is guaranteed to impose additional increased costs on consumers. The Applicants have not met that burden.

[CA Closing Submission, p. 2]

[51] The CA's concern about who would benefit from any increase was raised with the RGDA witness panel and Mr. Gardner. The CA suggested that retailers who have "opted out" of regulation might not benefit and that, for corporately-owned stations, the corporate enterprise would reap the benefit.

[52] While Mr. Conrad agreed that it was possible that a corporate "head office" might benefit, he believed that there could be some incentive provided to "opted

out” retailers. In response to Mr. Conrad, Mr. Ritchie (who has “opted out” because he had a good relationship with his wholesaler) said:

Q. What assurance do you have that your wholesaler will let you take advantage of a one-cent-a-litre increase in retail margin should we be successful in the Board making the decision to approve this application?

A. I feel strong – my relationship – we’ve been with the same company for 27 years. My business relationship, I don’t feel any issues there.

[Transcript, pp. 149-150]

[53] Mr. Gardner confirmed for the CA that where the benefit would go is unknown without a survey after the fact; however, he said he expected the “wrestling match over the margin” (between a retailer and its wholesaler) would not change.

### 5.1.1 Findings

[54] The Board is satisfied that, in the circumstances, there is sufficient evidence on which it is able to make a finding of whether there should be an increase in the minimum and maximum retail mark-ups. It is clear to the Board that both the RGDA and Mr. Gardner have, although by different methods, demonstrated that there has been an increase in expenses for wages, credit card fees and utilities, as well as other operating expenses. Although there is a dearth of evidence as to steps retailers may have taken to mitigate the impact of those increases, the Board is persuaded that an increase in mark-ups is warranted, subject to the comments below.

[55] The Board notes that no evidence was presented to the contrary.

[56] The Board further observes that, while it cannot be certain that the benefit of an increase will be passed on to all retailers, there is evidence to satisfy it that

retailers who have “opted out” of regulation will obtain some share of the benefit from their corporate suppliers.

[57] Although the CA argued that the existing 1.5 cpl spread in the mark-ups for self-service petroleum products could be used by retailers to offset the increases in costs, the Board accepts that, as described by Mr. Conrad, Mr. Ritchie and Mr. Gardner, this would result in a competitive environment that would ultimately drive some retailers out of business. Such a result would be contrary to the purposes of regulation as set out in paragraph 7 of this Decision.

[58] Similarly, as Irving stated in its Closing Submission, an increase in the mark-ups will:

...assist in preserving the availability of specified petroleum products in rural areas, as specifically noted in Regulation 2(a). As rural dealers have less of an ability to benefit from larger volume, it is important that their minimum mark-up provides them with an ability to at least cover their costs.

[Irving Closing Submission, p. 6]

[59] The Board finds that an increase in the minimum and maximum mark-up for self-service and the minimum mark-up for full-service petroleum products is just and reasonable. The Board will address the quantum of the increase, and whether there should be any change to the maximum full-service margin, below.

## **5.2 How much of an increase should be granted?**

[60] The RGDA sought a 1 cpl increase in each of the minimum and maximum self-service margins. It also sought a 2.5 cpl increase in the minimum full-service margin, which the Board will address later in this Decision. The RGDA submitted that

its evidence demonstrated that the increase proposed was fair and reasonable, and noted that costs will continue to rise in the future, including the minimum wage.

[61] Irving agreed with the proposed increase to both the maximum and minimum mark-ups for self-service fuel, pointing out that the amount requested by the RGDA fell in the middle of the range of 0.81 cpl and 1.11 cpl noted by Mr. Gardner, and saying:

The evidence of 3067500/RGDA demonstrates that, based on both dealer supplied and publicly available information, increases have occurred with respect to minimum wages, credit card surcharges, utility costs and general CPI. This evidence supports their requested increase in the self-serve minimum and maximum margin of 1.0 cent/litre ...

...

Following the filing of the Application and evidence of 3067500/RGDA, and interested party Information Requests to 3067500/RGDA and their responses, Intervenor and Board Counsel consultant evidence was filed on the issue of the appropriate retail margin. No intervenors filed expert evidence in opposition to 3067500/RGDA's request.

The expert report by Gardner Pinfold, filed on behalf of Board counsel, was based on an independent review of the Nova Scotia marketplace, and the findings of Gardner Pinfold were consistent with the recommended 1.0 cent/litre increase of 3067500/RGDA.

...

[Irving] submits that the overwhelming evidence before the Board is that it is appropriate to increase the minimum and maximum retail mark-ups for self-serve by at least 1.0 cent/litre as proposed by 3067500/RGDA. Such an order would be consistent with the recent Energy and Utilities Board Decision in New Brunswick, dated June 28, 2011, in which the maximum retail margin was increased by 0.9 cents/litre, consistent with the higher end of Mr. Gardner's recommended increase in that jurisdiction.

[Irving Submission, pp. 3-5]

[62] When considering furthering of the objectives of the *Regulations*, Irving stated:

[Irving] submits that an increase in the retail mark-up in the amount of 1.0 cent/litre would help further the objectives outlined in both Regulation 2 and 18.

...

With respect to Section 18(1), the Board is to consider, in accordance with subsection (1)(b), whether the retail mark-ups are just and reasonable. .... With respect to subsection 18(1)(a), [Irving] notes that the retail mark-ups within the Province have not changed for a period of five years and, as the evidence in this proceeding indicates, those retail mark-ups have eroded during that time.

[Irving Closing Submission, pp. 6-7]

[63] Atlantic supported the RGDA application for a 1.0 cpl increase to margins. Mr. Grant submitted on its behalf that a lower increase would not be justified because anticipated cost increases were not included. He noted that with a lower increase owners would have to take less income, and lower volume stations might close because they would be unable to invest in necessary infrastructure.

[64] Mr. Plett agreed with an increase in the maximum self-service margin, but was opposed to an increase in the minimum margin as noted earlier in this Decision.

[65] Mr. Ritchie agreed with the increase proposed by the RGDA, as stated above, but later went on to say that one cent is not enough:

And I do support an increase. I think one cent isn't enough if the prices keep going up, because we're going to be back at this table within six months. So, maybe there's a solution to put a sliding scale to protect a margin that we know that we can go to the bank and operate our businesses properly on.

[Transcript, p. 131]

[66] Board Counsel asked Mr. Ritchie about the size of a margin increase in the context of volume increases:

Q. Well, okay. I'll just make sure we're clear. You have a certain volume at a particular point in time, okay?

A. Right.

Q. You have a certain profit that you're making on that volume.

A. Right.

Q. Your volume increases.

A. Right.

Q. To make that same profit, doesn't it follow that your margin can be slightly lower?

...

A. Okay. You're saying if you're looking on the litre scale of it, if my litres increase?

Q. Yes. And to maintain the same profit level that you're making at that time ---

A. Right.

Q. --- but you're making -- you're selling more ---

A. Correct.

Q. --- you don't still have to have the same margin to maintain the same profit level?

A. Correct.

[Transcript, pp. 137-138]

[67] Mr. Ritchie went on to say, however, that he would expect to be more profitable as a result of a volume increase.

[68] The evidence presented by Mr. Gardner initially identified the total impact on costs, demonstrating a need for an increase in the minimum margin of 0.83 cpl and to the maximum margin of 1.14 cpl. This resulted from increasing costs from 2006 to 2010. As noted earlier in this Decision, his revised Table 5 changed the needed increases to 0.81 cpl and 1.11 cpl.

[69] The Gardner Report suggested that, due to increases in costs in proportion to the margins, the minimum margin should therefore increase by 0.8 cpl while the maximum margin should increase by 1.1 cpl (rounded).

[70] The Gardner Report cited Prince Edward Island's margin adjustment in 2008 in which the maximum mark-up increased by more than the minimum mark-up for self-service gasoline. There the minimum mark-up was increased from 4.0 to 4.5 cpl (an increase of 0.5 cents) while the maximum mark-up increased from 5.5 to 6.5 cpl (an increase of 1.0 cents).

[71] None of the Intervenors specifically questioned Mr. Gardner's suggestion to apply different increases to the minimum and maximum self-service retail mark-ups during the hearing; the majority of Intervenors stated their support for the RGDA's request for a 1.0 cpl to both the maximum and minimum self-service mark-ups.

[72] The Gardner Report referred to average volumes as relatively unchanged from 2006 to 2009. The Report did not take into account the increase experienced from 2005 to 2006 and from 2009 to 2010. Mr. Gardner requested, but generally did not receive, data from retailers for 2005. Also, the Board notes that the Statistics Canada report on Retail Gasoline Sales Volume for 2010 became available after he filed his report.

[73] Mr. Gardner's recommendations, similar to the RGDA, did not factor in volume efficiency to account for average volume increases from 2005-2010, which could, to some extent, mitigate the need for a margin increase to cover the increased operating costs, or the size of any increase.

[74] As noted earlier, the CA did not support any increase in margins and stated:

61. The Consumer Advocate submits the existing self serve retail margin of 4 to 5.5 cents a litre continues to be just and reasonable in all the circumstances.

[CA Closing Submission, p. 13]

### **5.2.1 Findings**

[75] The Board finds that it is just and reasonable to increase the minimum self-service and full-service mark-up by 0.8 cpl and the maximum self-service mark-up by 1.1 cpl.

[76] The Board is persuaded that greater weight should be given to the data in the Gardner Report as it considers the amount proposed by the RGDA to be less rigorously determined. The Board accepts Mr. Gardner's evidence that the total actual

cost increases incurred by retailers may not be as high as the absolute percentage changes for labour and utilities.

[77] Further, the Board understands that Mr. Gardner's suggestion to increase margins was intended to account for increases already experienced, rather than to project future costs. The Board considers this offers some additional certainty.

[78] The Board has chosen to increase the minimum and maximum mark-ups for self-service by different amounts, as suggested by Mr. Gardner. The Board is satisfied that it is not necessary to have increases of the same amount in the mark-ups, and notes that the spread on self-service margins will increase by 0.3 cpl. The Board observes this will give a slightly greater amount (10%) on the maximum self-service mark-up than sought by the RGDA, which the Board considers will contribute to the viability of the more remote or rural retailers. The Board considers that the slightly lower amount of the increase in the minimum mark-up is sufficient to accommodate the increase in expenses at present.

**5.3 Should the minimum and maximum retail mark-up vary by zone (exclusive of the transportation allowance)?**

[79] The RGDA's application was for the same increase in mark-ups across all zones within the province. Mr. Conrad testified that the RGDA had not considered whether the margins might vary by zone.

[80] In an exchange with the Board, Mr. Plett opined that varying mark-ups by zone may have merit:

Q. Do I understand from your evidence, when you've looked at the various results in the zones across the Province, are you suggesting that the margin needs to be addressed by zone?

A. I think it's quite possible in maybe Zone 4's case, and maybe Zone 3's case.

Q. And in Zone 4, that's because of the competition with New Brunswick?

A. The border.

Q. Okay.

A. Yes.

Q. And Zone 3 is because?

A. Just what I found from the results of a survey took, it seemed like a number of them were at the maximum at that time. I don't know if they were like that before or since, but that particular day it seemed most of them -- the majority of them were at the maximum already.

[Transcript, pp. 119-120]

[81] Submitting that a uniform increase is aligned with the objectives of regulation,

Irving stated:

...

Continuing to have a set minimum and maximum retail mark-up that is consistent throughout the Province will also help to stabilize the prices of petroleum products and minimize the variances in the prices of petroleum products across the Province (Regulation 2(b) and (c)), subject to the Board-approved transportation differential. ...

[Irving] does not believe that the minimum retail mark-up should vary by zone (exclusive of the transportation allowance). For the reasons noted above, [Irving] believes the proposed revised retail self-service mark-ups would be just and reasonable and consistent with the objectives set out in the Regulations. [Emphasis added]

[Irving Closing Submission, pp. 6-7]

[82] Mr. Ritchie expressed his dislike of zones in general, suggesting they pit "rural versus urban". He questioned why those in rural areas should be obliged to pay more for gas.

[83] Both Irving and the CA noted that there was no evidence before the Board to support different mark-ups according to zone.

[84] Mr. Gardner testified that changing mark-ups by zone may not help rural independent retailers. In response to a question from the Board, he said:

I think if you begin to make adjustments in allowable margin zone by zone, it's not clear that you're really helping those rural independents. They're still having to compete with ... something other than the posted price in many cases. And whether that's a -- you know, whether it's a price difference, whether it's a reward mile, whether it's some other

promotion, it's still, you know, an issue. For the extreme remotes, it's perhaps less of an issue, but those extreme remotes are full-serve, and they're -- you know, they're charging what the market will bear now anyway.

[Transcript, pp. 235-236]

### **5.3.1 Findings**

[85] The RGDA did not seek to vary the mark-ups by zone. Although Mr. Plett suggested this might be required in Zones 3 and 4, there was no evidence before the Board on which it could make a finding that such a step would be just and reasonable.

[86] The Board observes that there was a lack of support for variation. Based on Mr. Gardner's evidence, the Board considers that the objective of ensuring availability of petroleum products in rural areas may not be assisted by varying the margins by zone.

[87] The Board agrees with the Irving submission that consistent margins province-wide will, however, meet the objective of minimized variances in pricing.

[88] As a result, the Board finds that the minimum and maximum retail mark-up should not vary by zone (exclusive of the transportation allowance).

### **5.4 Should there be a difference in the minimum retail mark-up between full-service and self-service. If so, what should it be?**

[89] The RGDA asked for an increase in the minimum self service mark-up of 1 cpl and an increase in the minimum full-service mark-up of 2.5 cpl, so that the minimum full-service mark-up would be equal to the maximum self-service mark-up. When questioned by Mr. MacDougall, Mr. Conrad clarified the RGDA's position, saying:

Q. And here you say that your Application was designed to create the scenario where full-service minimum margins would, in fact, be 1.5-cent per litre above the minimum self-serve, correct?

A. Yes, that's correct.

Q. And your position, as we understand it, is that you would like the minimum self-serve margin to go up to 5-cents, but the full-service margin to go up to 6.5-cents?

A. That's correct.

[Transcript, pp. 56-57]

[90] The RGDA pointed out that the majority of stations offering full-service were already charging, as permitted under the *Regulations*, more than the maximum self-service mark-up due to the cost of providing the service.

[91] The RGDA filed a copy of an internal survey done to obtain actual prices from a number of member stations to compare full-service prices and self-service prices. This supported the RGDA's statement that majority of full-service stations were charging in excess of the self-service price. As stated by Mr. Conrad:

As I say, we do a survey every week and full-serve prices vary all over the place, which is good. It shows that there's competition and it shows that retailers are able to price point at whatever their requirements are.

[Transcript, p. 83]

[92] Mr. MacDougall asked the RGDA about a situation that might arise by setting the minimums differently for full and self-service:

Q. So if there's a full-service outlet that's close to a self-serve outlet, and that -- and a full-service outlet wanted to be able to compete on price, if we set a minimum margin that had to be 6.5-cents, they couldn't compete on price within a range of 1.5-cents, correct?

A. That's correct.

Q. And would you see that as a hardship, possibly, for those full-serve stations in those situations?

A. It is a consideration.

...

Q. But isn't it also true, as you've already stated that there could be situations where full-service outlets that are only full-serve are in close proximity to self-serve outlets and want at least the flexibility to compete on price so that they don't lose all of their business?

A. Your point is well taken, but I guess -- and I'm not trying to say I'm a proponent of all this. This is just a part of the information-gathering process that we put forward, but when

you get into a scenario that you just described, you know, there are other ways to compete. ...

...

Q. But if your proposal did go through on the full-service pricing, it would take away that ability to compete by a full 1.5-cents per litre?

A. Yes. Yeah.

[Transcript, pp. 57-59]

[93] Mr. Conrad reiterated the RGDA's position outlined in its application:

... in our evidence I made reference to one of the fall outs from -- from our proposal, our application, you know:

"For a variety of reasons, some retail outlets, both independent and oil company controlled, continue to sell full service at the same minimum price as self service. These outlets may be adversely affected by an increase in the minimum price for full serve."

There's no question about that, especially if they try compete head on with self serve, an outlet nearby. But I guess our position is -- is that:

"... if the industry is to be encouraged to invest in new employment opportunities, training and associated costs of providing full service offerings, as well as to respond to the growing needs of seniors, disabled persons, tourists and new drivers, something has to be done to stabilize this investment area of opportunity."

[Transcript, pp. 36-37]

[94] The CA opposes increasing the minimum full-service mark-up by more than the self-service mark-up:

68. Currently, there is no maximum mark up for full serve gasoline and the minimum margin for full serve is the same as for self serve that is four cents a litre. The Applicants propose changing the relationship between the retail margins for self serve and full serve so that the minimum margin for full service gasoline would be the same as a maximum self serve margin that is 6.5 cents a litre. The Applicants argue this change would act as an incentive for retailers to offer the full service product.

69. However, the Applicants also concede that their proposal would constrain full service retailers that are trying to compete with the price charged at a self serve outlet: Testimony of Graham Conrad, Hearing Transcript, pp. 58-59.

70. As with the elimination of the minimum retail margin, there is not enough evidence before the Board about the possible implications of this proposal. Full service dealers have the ability to charge a price they need in order to provide the service. It is not clear why full service dealers who are able to compete on price with self serve retailers should be prevented from doing so.

[CA Closing Submission, pp. 14-15]

[95] Irving argued that the minimum mark-ups for both self and full-service should remain the same.

[96] Mr. Plett suggested there should be no changes to full-service in the Province.

[97] The Board questioned Mr. Gardner about the larger 2.5 cpl increase for full-service minimum as opposed to the requested 1 cpl increase for self-service. He indicated that an increase of 2.5 cpl on the minimum would not help rural retailers given that they are already charging more than that:

Q. ...There's also that request to increase the -- on the full-serve, the 2.5 cents. Do you have a comment on that particular issue, the full-serve vis-à-vis the self-serve?

A. Well --

Q. And you've heard the rationale today for that.

A. That's right, yes. If it's difficult for rural stations to compete now, giving them a minimum that's higher than -- and requiring any of the opted-in stations, you know, to actually, you know, receive that and pass it along, it's difficult to see how they could compete because, you know, you'll have stations that offer the full-serve that are self-serve stations. I mean, I can't see how that could work. And where there are -- where they're sufficiently isolated from competition, they already have the opportunity to charge above the -- you know, above that 2.5, and they do. So it's just not clear how they could possibly, as a practice matter, take advantage of that.

[Transcript, pp. 250-251]

[98] Mr. Gardner then went on to describe a situation in New Brunswick:

Yeah. Let me give you an example. There were two stations -- this is in New Brunswick -- more or less -- almost on the same lot -- one at a general store and the other station was at a convenience store and so on. One was full-serve, the other was self-serve. Now, there's no minimum in this -- in that province. Every time the full-serve moved the price within a cent of the self-serve station, the self-serve station moved it down another cent to make sure there was always a two-cent spread.

So within a year, I think, of the time I went to talk to the person -- and this is a rural station -- the full-serve station had gone out of business because they couldn't -- they simply couldn't compete. They simply couldn't. And there was nothing to say they had to be -- there had to be any spread, but the station next door made sure -- they policed that two-cent spread to make sure that, you know, people came to them. They had the latitude to do it, deeper pockets ...

[Transcript, pp. 251-252]

#### **5.4.1 Findings**

[99] As desirable as it may be to have full-service widely available, it is not one of the objectives of the *Regulations*. For those stations that offer both self and full-service there is nothing to hinder them from charging whatever premium they feel appropriate to offset the additional costs. At the same time, a station that only offers full-service and is in competition with a self-service station would be at a disadvantage if forced to charge a premium as requested by the RGDA. Accordingly, the Board finds no basis for a minimum full-service premium. The Board denies this part of the Retail Margin Application.

[100] The Board finds that the minimum self-service and full-service mark-ups should increase by the same amount, i.e., 0.8 cpl.

#### **5.5 Should there be a maximum retail mark-up for full-service?**

[101] The RGDA did not apply for a change to the maximum full-service mark-up. In response to a question from the Board, Mr. Conrad stated:

On the maximum end that doesn't seem to be a problem ...

[Transcript, pp. 83-84]

[102] Irving's position is that the absence of a maximum full-service mark-up should continue:

Currently there is no maximum retail mark-up for full-service, allowing the ceiling to be determined by competition. In fact, the cap that was initially put in place at the time of regulation was subsequently explicitly removed. [Irving] believes this position should continue. A full service offering does in general require more cost than a self-serve offering, and to the extent retail dealers, particularly in rural locations, believe it is necessary for them to charge more than the minimum retail mark-up, they should be entitled to do so. The maximum they can charge will obviously be constrained by the willingness of parties to purchase their product, and [Irving] is not aware of any evidence

which suggests that having no maximum for full-serve has had a negative impact on the retail petroleum marketplace.

...

No party has filed evidence suggesting that there should be a maximum full-serve retail mark-up. [Irving] believes that this indicates that this is not an area of concern.

[Irving Closing Submission, p. 10]

[103] Mr. Plett also believes that no change should take place with full-service.

[104] Mr. Grant noted Atlantic's position on a set maximum retail mark-up:

The Atlantic Convenience Stores Association does not support the regulation of the maximum retail mark-up for retail gasoline provided on a full service basis.

[Atlantic Closing Submission, p. 1]

### 5.5.1 Findings

[105] The Board finds that there is no request for, or indeed any evidence to support, a change to the present maximum price for full-service.

### 5.6 Should the transportation allowance be increased in any or all of the zones? If so, by what amount?

[106] On May 31, 2011, Irving filed its evidence regarding the Transportation Allowance Application. The following Table shows the proposed increases in the respective zones:

<b>TABLE A</b>			
<b>Proposed Transportation Allowances (in cpl)</b>			
<b>Zone</b>	<b>Current Allowance</b>	<b>Proposed Increase</b>	<b>Proposed Allowance (rounded)</b>
1	0.3	0.15	0.5
2	0.7	0.29	1.0
3	1.2	0.20	1.4
4	1.2	0.31	1.5
5	1.2	0.29	1.5
6	2.0	0.17	2.2

[107] Mr. Holland, on behalf of Irving, stated transportation costs have increased:

We provide delivery to our retailers, and this is delivery of the petroleum products. [Irving Oil] is also charged the actual market base cost for the transportation of these fuels to these outlets by another Irving owned transportation company.

We charge our branded retailers the zone base transportation rates determined by regulation. Since 2005, the cost of providing the delivery of petroleum has increased in all six zones. We have provided evidence -- as evidence the actual transportation cost of 84 locations that existed in 2005 and continue to operate today.

[Transcript, p. 152]

[108] Mr. Holland was asked how the transportation costs are determined for his company:

The way our transportation division works and the way we receive our costs is that they often take their business to tender, to other third party transportation.

In certain provinces, they actually have outsourced our transportation to those third parties. So they're very well aware of what market rates are and the rates that we provide to -- to my division are those market based rates.

Also with the amount of volume that we take to tender that we feel we are getting probably one of the lowest rates in the industry. So I think it's representative, but it may be representative of the lower end of a cost scale. And since it's all linear, our cost increases could be lower than the average industry transportation.

[Transcript, pp. 158-159]

[109] Irving suggested that the increase in its transportation allowances be added to the current allowances. This is based on the premise that the original transportation allowances were reasonable:

Our application assumes that the original transportation rates were reasonable. Our request is simply to raise the allowances by zone to cover the additional actual increased costs that we have incurred.

[Transcript, p. 152]

[110] Board Counsel asked Mr. Holland whether it would be more appropriate to use the actual cost data for the new transportation allowances rather than the increases requested to be applied to the existing rates:

Q ... why not just use the costs as they are today? In other words, you -- you've added on the increase to the existing base?

A. Right.

Q. Why not just use the actual costs?

A. Wouldn't be opposed to that. For simplicity, for this hearing, we made the assumption that the rates that were established were just and reasonable

[Transcript, p. 161]

[111] Irving also suggested that the Board consider adopting a formulaic adjustment mechanism ("FAM") to apply in the future to any transportation allowances which it may set in this proceeding. However, Irving had no specific proposal for the Board.

[112] Mr. Gardner responded to a Board question about the Transportation Allowance Application and Mr. Holland's description of the industry's operations, specifically:

... we would assume that there's a factual basis behind those -- you know, those costs that were tendered, and the description of how the industry works is certainly accurate, and the same kind of cost pressures are affecting transportation as they are the operation of the stations themselves.

[Transcript, p. 237]

[113] The CA supports the need for an increase in the transportation allowances:

74. It is not clear that the transportation allowance has ever allowed fuel wholesalers to recover all their freight costs: Exhibit T-25, T-26 (c), Irving Oil Marketing GP Responses to the Information Requests of the Consumer Advocate, IR-1. However, there is no question that freight costs have increased since the current transportation allowance was established.

75. The increases in the transportation allowance requested by the Applicant are modest and are supported by detailed cost data.

76. The Consumer Advocate agrees that the transportation allowance should be increased in the amounts proposed by Irving Oil Marketing GP.

[CA Closing Submission, p. 16]

[114] The RGDA and Atlantic did not oppose the Transportation Allowance Application, nor did they make any submissions on the issue.

[115] Mr. Plett suggested having one transportation allowance apply across the entire province. He stated:

The current six zones needs to change into just one zone ... This would have the added benefit of possibly having greater price stability across the whole Province (rural & urban) [and] minimize any variances throughout the whole Province [and] has the real potential to bring low volume rural Nova Scotia stations to actually be able to have a competitive price with their urban colleagues.

[Tidnish General Store Closing Submission, pp.1- 2]

[116] Mr. Ritchie was questioned by the Board about Mr. Plett's proposed provincial transportation allowance. He stated:

Yeah. ... in general, me, as a consumer, why can I not pay the same price for gas in Annapolis Royal and in Lower Sackville, Nova Scotia? Why am I being penalized ... for where I live ...

[Transcript, pp. 145-146]

[117] When asked about having one zone in the Province, Mr. Holland responded:

A: Right. My concern with that is if it didn't cover the costs associated with rural dealers far away from a supply point like Dartmouth, that it would be a big disincentive to a wholesaler to supply that location.

If -- if I remember the testimony from Tidnish General Store, I think he mentioned his rate for freight was two point eight cents (\$0.2.8) per litre. If a wholesaler could only recover a penny of that, they'd be very disinclined to supply that site with fuel. So as this industry works, anything can work if the unit margin is great enough.

Q. In other words, it would only work in a way sort of like for your company where you are all across the province anyways. But if someone's wholesaling only a specific area, that it might be disincentive if it happened to be an area that's quite a ways away?

A: Right. If -- if Yarmouth, for example, cost you two cents (\$0.02) per litre to deliver to, but a province-wide rate was only at a penny, you'd be less likely to deliver to those locations or sign them up as an account. Because they'd be -- you know, a penny is a tremendous amount of money. [Emphasis added]

[Transcript, p. 164]

### **5.6.1 Findings**

[118] The Board notes that no party opposes the Transportation Allowance Application. Indeed, in his Closing Submission, the CA “agrees that the transportation allowance should be increased in the amounts proposed by [Irving]”.

[119] Having reviewed the evidence, the Board is satisfied that there has been an increase in the underlying costs of transportation since regulation was implemented by the Province. These cost increases have eroded the objective of the transportation allowances for wholesalers and retailers.

[120] The Board accepts the evidence of Irving that there has been an increase in the average actual cost of transportation in each of the six zones between 2005 and 2011, ranging from an average increase of 0.15 to 0.31 cpl across the zones.

[121] Further, the Board notes that the pre-filed evidence is based on the actual transportation costs of 84 locations across all six zones in the Province. Given the scope and extent of Irving’s distribution system across Nova Scotia, as noted during the hearing, the Board finds that the proposed increases are representative of the cost increases which have impacted industry as a whole, and are likely conservative.

[122] Taking into account all of the evidence, the Board approves the Transportation Allowance Application for the proposed increases in each of the six zones across the Province.

[123] The Board notes that the Transportation Allowance Application is approved on the basis of the average cost increases in each zone since the start of gasoline pricing regulation.

[124] While not specifically opposed to the Transportation Allowance Application, Mr. Plett suggested that there should be one uniform zone across the province. However, the Board accepts Mr. Holland's evidence that such a structure would jeopardize the delivery of gasoline products to rural stations because the cost of serving those stations would exceed the average allowance applied to the entire province.

[125] Finally, Irving asked the Board to consider adopting a FAM so that future changes in transportation costs would be recovered on a more regular basis. However, no specific proposal was advanced for consideration by the Board. Irving suggested that, if the Board were to consider a FAM, it could initiate a technical consultation process between Board staff, SNSMR and industry participants.

[126] Mr. Gardner cautioned that the adoption of a formulaic adjustment could result in non-fuel elements being introduced into the cost structure. He stated that an application-based approach, similar to the one in the present matter, may be the preferred approach.

[127] The Board denies the request for a FAM to apply regular future changes to the transportation allowances. In the view of the Board, any future changes proposed to transportation allowances should be considered in the context of an application to the Board.

## **6.0 CONCLUSION**

[128] Taking into account all of the evidence and submissions in this proceeding, the Board approves, in part, both the Retail Margin Application and the

Transportation Allowance Application, pursuant to s. 24 of the *Regulations*. The Board considers that its approval of the applications will foster the objectives of the *Regulations*, including preserving availability of regulated petroleum products in rural areas and minimizing the variances of prices across the Province.

[129] The Board notes that the increases to the retail mark-ups and transportation allowances approved in this Decision shall apply to all industry participants and shall be incorporated into the Board's weekly setting of regulated petroleum product prices, effective 12:01 a.m. Friday, January 6, 2012.

## **7.0 SUMMARY**

[130] Based on the evidence presented at the hearing, the Board's findings are as follows:

- (1) The Board approves the application to increase the minimum self-service and full-service mark-up by 0.8 cpl and the maximum self-service mark-up by 1.1 cpl;
- (2) The Board finds that the minimum and maximum retail mark-up should not vary by zone;
- (3) The application included a request for an increase in the minimum self service mark-up of 1 cpl and an increase in the minimum full-service mark-up of 2.5 cpl, so that the minimum full-service mark-up would be equal to the maximum self-service mark-up. The Board denies the request for a difference in the minimum retail mark-up between full-service and self-service;
- (4) There was no request or evidence to support a change to the present maximum price for full-service;
- (5) The Board approves the application to increase the transportation allowances in each of the six zones across the province, ranging from an average increase of 0.15 to 0.31 cpl across the zones (as set out in Table A, para. 106). However, the request to adopt a formulaic adjustment mechanism, to regularly apply future cost increases to the transportation allowances, is denied;

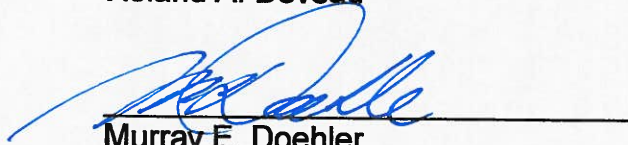
- (6) The increases to the retail mark-ups and transportation allowances approved in this Decision shall be incorporated into the Board's weekly setting of gasoline and diesel oil prices, effective 12:01 a.m. Friday, January 6, 2012.

[131] An Order will issue accordingly.

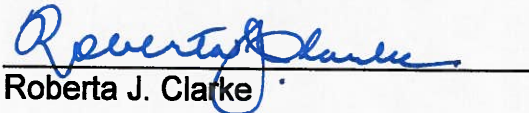
DATED at Halifax, Nova Scotia, this 23<sup>rd</sup> day of November, 2011.



Roland A. Deveau



Murray E. Doehler



Roberta J. Clarke