

IN THE MATTER OF A COMPLAINT filed with the County of Paintearth No. 18 Composite Assessment Review Board (CARB) pursuant to Part 11 of the *Municipal Government Act*, being Chapter M-26 of the Revised Statutes of Alberta 2000

BETWEEN:

Alberta power 2000 Ltd. c/o AEC International Inc. (AEC) represented by Wilson Laycraft LLP
– Complainant

-and-

County of Paintearth No. 18 (Paintearth) represented by Reynolds Mirth Richards & Farmer LLP
– Respondent

BEFORE:

Paul Petry, Presiding Officer
Tony Nichols, Member
Wayne Richardson, Member

Board Counsel:
G. Stewart-Palmer, Barrister & Solicitor

Staff:

T. Peach, Composite Assessment Review Board Clerk

A hearing was held on May 7-11 and May 16, 2012 in Castor, in the Province of Alberta to consider a complaint about the assessment of the following property tax roll number:

720005980	Assessment	\$59,318,860
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PART A: BACKGROUND AND DESCRIPTION OF PROPERTY UNDER COMPLAINT

[1] This appeal relates to a property assessment for buildings and structures. The issue raised by the Complainant is that the assessed value of property on this roll number includes the value of linear property. The Complainant argues that the value of the improvements pertaining to linear property should be removed from the property roll. The Complainant also argues that regardless of whether a change is made respecting the suggested inclusion of linear property, the subject property is assessed above its market value.

PART B: PROCEDURAL OR JURISDICTIONAL MATTERS

[2] The CARB derives its authority to make decisions under Part 11 of the *Municipal Government Act*, R.S.A. 2000, c.M-26 (“MGA”).

Procedural Issue #1

[3] The CARB indicated in its decision 2012-01 that it wished to take a site tour and asked the parties to prepare an agreed document in relation to the tour. The Respondent prepared a document (ultimately marked as Exhibit R12) which contained described photographs. The Complainant indicated that it did not agree with the words used by the Respondent in Exhibit R12.

[4] Although the direction of the CARB was that the parties submit a joint document, the Complainant indicated that it would not object to the inclusion of the Respondent's document if it were marked as a Respondent exhibit. As a result, the CARB marked the document as R12 (indicating it originated with the Respondent).

Procedural Issue #2

Position of the Respondent

[5] The Respondent brought a preliminary application regarding preliminary matters and sought the CARB's ruling.

[6] The issues relate to whether evidence contained in Mr. Hall's Rebuttal Report marked as Exhibit (C5) is outside the scope of proper rebuttal, and should have formed part of his original report filed on November 28, 2011 (C1). The scope of improper rebuttal evidence includes:

- a) Where the age life is changed to 40 years from 60 years; and
- b) Those portions of the report where depreciated replacement cost new figures are proposed using cost estimates prepared by OEC Industrial.

[7] The Respondent asked the CARB for a ruling as to whether portions of Mr. Hall's March 28, 2012 (C5) should be excluded as being improper rebuttal evidence.

[8] In relation to the cost estimates, they were prepared by Mr. Papuha and were filed in November 2011. The time for the Complainant to use those estimates for a market value number was November 2011.

[9] The second concern is in relation to the depreciation arising from the age life. At Exhibit C1, in tabs R and S, the age life is set at 60 years. The Assessor used 60 years as an age life. Exhibit C5 sets out the age life at page 29 as 40 years, which is not proper rebuttal, but a change in approach.

[10] The Respondent asks that bottom half of page 27 and 28, pages 29, 30 33 and 34 should be struck by the CARB.

Position of the Complainant

[11] The Complainant argued that C5 was a proper rebuttal and relied upon the *Mersey Paper* case for the proposition that the Complainant (here) needed to have the Assessor's figures in order to respond. In R1, paragraph 14 and Tab 6, they refer to modifiers. The inventories are different, so the Complainant did not know, until it received the Respondent's disclosure what inventory the Assessor was valuating and that is why it is proper rebuttal. Further, at R2, Tab 2, there is a depreciation factor set out by Mr. Zeiner. It would be unfair for the Complainant if it could not deal with that issue. The Respondent has put forward a position and the Complainant is entitled to respond to that position.

Decision and reasons on Issue #2

[12] In its December hearing, based upon the representations of the parties, they were to be working to a resolution of the market value issues outside the impact of the linear vs. property issue. At that time, the CARB accepted the market value issue as being a live issue, in part because of the positions of the parties that if there was to be an agreed change, the CARB would need to embrace the change. Although the parties have not been able to reach a resolution of the market value issue, it continues to be a valid issue before the CARB.

[13] While the Assessor's evidence and Mr. Hall's initial report rely on the 60 year age life, Mr. Zeiner's report opens the door to questions of alternative depreciation schedules and age-life assignments. The Complainant's rebuttal relies, in part, on Mr. Zeiner's age life and depreciation rates and this is a counter analysis to the notion of market value. As a result, the CARB accepts the whole of Exhibit C5 as being admissible rebuttal evidence.

PART C: MERIT ISSUES UNDER COMPLAINT

[14] The issues to be determined by the CARB are as follows:

- a) Does the July 1, 2010 valuation and the resulting assessment include components of the facilities which are not assessable as "property"?
- b) If the assessed value includes components which are not assessable as "property", what is the correct assessment once these components are removed?
- c) Should there be a reduction in the assessment of approximately \$1.8M arising from a failure in 2003 to make this correction?
- d) As a separate issue from a) and b) above, does the assessment represent a reasonable estimate of the subject property's market value?
- e) Is the property inequitably assessed considering the assessment of similar properties in the County?

[15] Each of the witnesses provided written reports in addition to their oral testimony. This decision reports a brief summary of their evidence, but the CARB has reviewed both the oral testimony and the written reports of each witness.

Summary of Complainant's witnesses

[16] The Complainant called 3 witnesses: Mr. Robert Froc, Mr. Robert Papuha and Mr. Cameron Hall.

[17] Mr. Robert Froc of Froc Engineering was accepted to give expert evidence in the area of structural engineering. His mandate was set by AEC International Inc. and was limited to the boiler houses and turbine halls. His mandate was to determine what portion of the boiler houses and turbine halls were necessary to support the machinery and equipment, including the various pieces of equipment listed at page 4 of C2 for units 3, 4 and 5. Unit 3 was similar to Unit 4.

[18] Froc Engineering reviewed the available drawings and conducted a physical inspection of the Battle River facility to determine what was supporting structure for the machinery and equipment and what was non-supporting.

[19] Froc Engineering had access to all the structural and process drawings except the foundation drawings. The structure was designed to support the weight of the boiler which is top hung to accommodate the change in length of the boiler when it expands due to heating. The lateral stability is provided by cross-bracing which transfers horizontal loads to vertical bays. This takes the lateral loads to the foundations. The locations of the transferring vary due to the need for open space. There is a wind load on the exterior face. If the cladding was not present, the structure is full of equipment and the wind load would still be there. The purpose of the cladding is to enclose the plant equipment to protect it from weather and from cold winter conditions.

[20] The floor systems are steel grating or checkerboard. The roof systems are decking to steel beams and are overlaid with roofing membranes. The structural steel is interdependent due to the lateral load. It is an integrated structural system. Mr. Froc went through the drawings contained in C3 as well as C9 and C10 and identified those portions which he identified as supporting (linear – shown in yellow) and which were identified as non-supporting (property – shown in blue).

[21] The roof beams sit on top of the boiler suspension girders. The roofs did not have machinery and equipment on the roof or hanging from the roof and were identified as non-supporting. The roof allocation included columns and vertical sections that went down to the first level of the floor system below the roof and in some cases more than one floor down.

[22] The function of the floor system is to provide access to the machinery and equipment and to hang the piping and electrical cable trays. The structure was integrated with cross bracing and columns. In the interior of a power plant, there is something either on top of the floor, or hung from the underside of the floor, such as piping, etc. The vertical loads are transferred down through the vertical columns and horizontally through the girders and beams. The cladding and roofing system, including the roof membranes are shown as non-supporting.

[23] There were no foundation drawings, so Mr. Froc used his best judgment and assumed that there would be a raft slab – a slab throughout the whole footprint and the columns would sit on

top. He determined the load capacity and designed the footings to suit that. There was no allowance made for foundations or footings for the non-supporting because the roof system and cladding were considered having only an incidental impact on the structural components required by the linear features of the plant.

[24] His analysis for Units 3 and 4 was similar to the analysis for Unit 5.

[25] Once the supporting and non-supporting elements were determined, the colour coded drawings were provided to a cost engineering firm, OEC Industrial Project Services Ltd. ("OEC"), to do the quantity take offs and costing. Because the process was not straight forward, Mr. Froc participated to determine quantities of roof, floor system, exterior wall cladding and foundations. He had to define the make up of the floors and wall claddings so that OEC could do its estimate.

[26] He stated that the effect of the roof and wall cladding in total would be insignificant with respect to additional impact on the linear supporting structure. Mr. Froc also suggested that the wind factor may have required upsizing by one size for the top three floors and estimated that such upsizing would have a minimal impact on the distributed costs by only approximately 0.2%.

[27] Mr. Papuha, the principal of OEC, was put forward by the Complainant and accepted by the Respondent as having experience in cost estimating.

[28] The process of estimating starts with reviewing the drawings and then determining the quantities of materials required. Once quantities were determined, OEC then determined the installed costs of those quantities, including costs for labour material, construction equipment and subcontractors. OEC makes determinations for all the costs, based on a specific quarter of the year, the exchange rates, the material prices, the build up of labour rates and so on.

[29] The information required for costing comes from many sources including from historical data derived from working in the area for the last 24 years. Cost estimates are frequently compared to actual cost to compete a project and adjustments are then applied for future estimating. The subcontractor costs are all inclusive, including indirect costs, contractor fees, labour and material.

[30] Based on the direction from Mr. Froc, OEC determined required quantities and cost estimates for Units 3, 4 and 5. The OEC estimators used the colour coded drawings to determine the quantities of items contained in what was identified as "supporting" and "non-supporting". Two estimators worked independently on each unit so their work would not be biased by the work of the other and the results could be compared. Mr. Papuha reviewed both cost estimates to determine any disparities in their conclusions. The estimates for the percentages of supporting/non-supporting elements were remarkably close. The ratio of supporting to non-supporting in Units 3 and 4 was 68.1%/31.9% and for unit 5 the ratio was 70.6%/29.4%. The Complainant's term "supporting" refers components of the plant that it believes are required to support plant equipment or linear property and the term non-supporting refers to components which are not supporting plant equipment and therefore may be assessable as property. The non-

supporting elements included wall cladding and the roof system down to the first floor below the roof.

[31] OEC used current pricing for the 4th quarter of 2011 which reflected the complete cost to supply and install all elements of the power plant. This period was chosen because it was the most accurate costs close to the valuation date. The Complainant stated that using 40 year old information relating to costs as was done by the Respondent, would not be as accurate as using the current costs.

[32] OEC used an equivalency ratio based on heavy steel (\$1.52 per pound) as the benchmark for the costs, since this was the single largest component in the plant. As the predominant commodity, the heavy steel ratio was used as the basis to determine all costs. The reason was to nominalize all costs to an established ratio for ease of quantification and comparison.

[33] In cross-examination, Mr. Papuha indicated that his estimate did not include certain things, including plumbing, sprinklers, heating or lighting or electrical. He acknowledged that he was not aware of the mandate of an Assessor relating to valuing those things and had not read the legislation.

[34] The Complainant sought to qualify Mr. Cameron Hall as an expert in property assessment review. Following an objection by the Respondent, the CARB indicated that it would hear Mr. Hall's evidence as a representing tax agent and would give his evidence the weight which the CARB felt was appropriate.

[35] Mr. Hall spoke to the legislative scheme and argued that in this case there is no building. The roof and cladding serve only to provide protection of the equipment from the elements. The roof and cladding would not stand on their own and are simply part of the structure referred to in s. 284(1)(k) of the MGA. He indicated that, based on his review of the MGA, "structures" and "machinery and equipment" are exclusive categories. An item must be one or another. In the oil patch, machinery and equipment includes all supporting structures, which is different than for power plants. This has led to the filing of this appeal.

[36] Mr. Hall outlined the attempts of AEC to recreate the assessment based upon the Industrial Detail provided by the Assessor. He took the CARB through Exhibit C2 and C5, Tabs C, P, Q, R, S, T.

[37] Mr. Hall set out the scope of the instructions provided to Mr. Froc and, by extension, to Mr. Papuha. He outlined the work done in 2003 relating to the AEC study, with which AEC currently disagrees. The Complainant's position was that the value calculated in 2003 which has been brought forward includes the entire value of the supporting structure.

[38] Mr. Hall outlined the Complainant's position that the cladding is attached to that which is, by definition, machinery and equipment, because machinery and equipment includes the supporting structure and foundations. He referred to photographs which show coal fired power plants in warmer climates which have no cladding.

[39] Using Mr. Froc's analysis of supporting and non-supporting, the appropriate allocation of the assessed value for the turbine halls and boiler houses and should be attributed approximately 70% to linear, thereby reducing the overall assessment to approximately \$12.6M.

[40] Mr. Hall presented his calculation of cost for a shell building suggesting that, should the CARB decide that there is a building, the most the value could be would be no more than that of a shell building.

[41] In response to Mr. Zeiner's proposed 1.3 Alberta Factor, he outlined other properties for which other municipalities did not impose the 1.3 Alberta Factor that Mr. Zeiner has applied.

Summary of Respondent's witnesses

[42] The Respondent called 3 witnesses: Mr. Terry Willoughby, Mr. Kevin Zeiner and Mr. Doug Driscoll.

[43] Mr. Terry Willoughby of Municipal Property Consultants (2009) Ltd. is the municipal Assessor. He gave evidence of the history of the assessment rolls, the work in 2003 by AEC and Shaske and Zeiner regarding the appraisal, and the settlement of the issues in 2003, reviewing the letter of December 2, 2003 from AEC. He indicated that the parties agreed that \$1.8M was to be applied to the linear assessment for the 2003 year and the agreed value of \$43,781,530 addressed the approximately \$1.8M reduction. He also gave evidence summarizing the current assessment set out at \$59,318,490.

[44] Mr. Kevin Zeiner of Shaske & Zeiner gave evidence about his experience using the Marshall & Swift cost manual. He was accepted as an expert in appraisal. He commented on the Marshall & Swift manual and how to use it, and distinguished between how valuation might differ between an appraiser and an engineer.

[45] He explained the two methods: calculator and segregated cost. Mr. Zeiner indicated he used the calculator method in his 2003 appraisal. AEC used the segregated cost method in its 2003 report. Both are acceptable methods. He took the CARB through his 2003 report (Exhibit C2, Tab H) and the changes as identified in Tab I.

[46] He indicated that the costing accurately reflects the building structure for the boiler house units. He indicated that the costs did not include the floor or the superstructure for the boilers. In 2010, he updated the appraisal costs for a heavy steel building, applying the Marshall & Swift manual to do so. At Exhibit R2, Tab 2, he adjusted the costs in the 2003 AEC report to bring them to 2010.

[47] Mr. Dan Driscoll, of D. Driscoll Consulting Inc., was accepted as an expert in linear assessment who was authorized to give evidence on behalf of the Linear Assessor. He gave evidence in relation to the historical evolution of the legislation from the previous *Municipal Taxation Act* and *Electric Power and Pipeline Assessment Act* to the *Municipal Government Act*. He stated that there was no intention to change the scheme of assessment, but rather to amalgamate the statutes. Mr. Driscoll presented charts showing how the relevant legislation

stood both pre and post MGA. He argued that both the definitions for machinery and equipment and the definition for structures as they are found in s. 284 of the MGA and regulations are not to be applied to linear property. He stated that the approach taken by Froc Engineering of identifying “supporting” and “non-supporting” steel was not one that he had seen used before to identify linear property, nor is it identified in the current or past legislation.

[48] Mr. Driscoll indicated that it is important to identify the demarcation points between the linear property and the property. He acknowledged that there can be components that are part linear and part property; for example, concrete. However, they cannot be both, and the assessor must identify what component or portion thereof is linear and what is property. In his view, there is a building since there is lighting, a roof, walls, floors, and a heating system not associated with the boilers, plumbing and electricity.

Decision

[49] The assessment is revised to \$56,282,179.

Reasons

Issue 1

[50] The Complainant challenges the assessment of the boiler houses and turbine halls.

[51] The Complainant has advanced three alternative arguments in support of its position.

[52] The first argument is that there is no building at all. As part of this argument, the Complainant urges the CARB to find that due to the inclusion of the word “structure” in the definition of linear property, there is no “property” for the municipal Assessor to assess. What is contained in the boiler houses and turbine halls all form part of the electric power system as supporting structure for the machinery and equipment. This falls to the jurisdiction of the linear Assessor, and are thus to be removed from the municipal assessment. In this approach, all of the structure, including the roof and cladding on the boiler houses and turbine halls is linear property. The resultant municipal assessment value for the three items in question would then be zero. The municipal assessment for the improvements not in issue in the 2011 assessment would be \$9,400,000.

[53] In the alternative, if the CARB finds that some portion of the improvement falls to the municipal Assessor, the Complainant urged the CARB to accept the premise of “supporting” and “non-supporting” as identified by Mr. Froc and as costed by Mr. Papuha. Applying the percentages identified by Mr. Froc to the existing assessment for the boiler houses and turbine halls, the resultant assessment would be \$16,000,000.

[54] The Complainant submits that the cost takeoff analysis of Mr. Papuha is a recent and reliable costing of the boiler houses and turbine halls represents actual costing experience in Alberta. With respect to the cost take-off for the non-structural components, Mr. Hall arrived at a total installed cost for the non-supporting structure as of July 1, 2010 of \$10,903,154, and a depreciated replacement cost new of \$6,614,684 for Units 3, 4 and 5.

[55] Mr. Hall argued that the roof systems and the building claddings only should be valued at \$3,183,668.

[56] In the final alternative, Mr. Hall argued that if the CARB finds that there is a building, the Complainant urges the CARB to accept the valuation of the “high quality shell building” as valued by Mr. Hall. In this alternative, the revised assessment would be for a High Quality Shell Building \$12,662,771 for the boiler houses and turbine halls and \$22,071,401 for all buildings at Battle River.

[57] By contrast, the Respondent urged the CARB to confirm the 2011 assessment on the basis that the Complainant had not discharged its onus to show that something other than “property” has been included in the 2011 assessment. The assessment includes only buildings, properly assessed by the municipal Assessor. The Respondent urged the CARB to confirm the assessment.

[58] With respect to issue #1 (a determination of whether the entirety of the power plant is linear property), the CARB reviewed the MGA which establishes a division between “property” and “linear property”. Section 285 establishes the municipality’s responsibility to prepare an assessment for each property in the municipality, except for linear.

285 *Each municipality must prepare annually an assessment for each property in the municipality, except linear property and the property listed in section 298.*

[59] Section 289 of the MGA requires the municipal assessor to prepare an assessment for all property in the municipality, except for linear property.

289(1) *Assessments for all property in a municipality, other than linear property, must be prepared by the assessor appointed by the municipality.*

[60] The jurisdiction to deal with assessments for linear property is to be done by a linear assessor designated by the Minister.

292(1) *Assessments for linear property must be prepared by the assessor designated by the Minister.*

[61] The CARB notes that the legislative scheme creates two broad categories. On the one hand is linear property, to be dealt with by the linear assessor and whose assessment appeals go to the Municipal Government Board. On the other hand is property, whose assessment appeals go to an Assessment Review Board in accordance with Part 11, Division 1 of the MGA.

[62] The jurisdiction of the CARB is found in section 467(1) of the MGA.

467(1) *An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.*

[63] In the current appeal, the CARB’s jurisdiction is whether to change the assessment or to decide that no change is required. The assessment is predicated on the basis that everything contained in the assessment is property.

[64] The onus lies with the Complainant to present evidence to the CARB which satisfies the CARB that the property has not been correctly assessed as “property”.

[65] The parties urged differing interpretations of the legislation to the CARB. The parties urged the CARB to accept their differing interpretations on what is meant by “property” and “linear property” in the MGA.

[66] The Complainant’s position is that an “electric power system” includes not only the machinery and equipment, but also all structure, installations, etc. used in the generation of electricity. The structures in question are the structures that make up the boiler houses and turbine halls at the property. The Complainant argued that “machinery and equipment” includes supporting foundations and footings and other things forming an integral part of an operational unit used in an electric power system. It claims that all of these specially built supporting structures are integral to the power generating machinery and equipment at Battle River.

[67] The Respondent argues that “property” and “linear property” are exclusive definitions and urges the CARB to give meaning to the exemption found in the definition of “linear property”, that “buildings” are expressly excluded from the definition. The Respondent urges the CARB to find that the assessment in question relates to a “building”.

[68] The CARB has examined the definitions contained in the MGA. Section 284(1)(r) of the MGA defines “property” as:

- (r) *“property” means*
 - (i) *a parcel of land,*
 - (ii) *an improvement, or*
 - (iii) *a parcel of land and the improvements to it;*

[69] Improvement is defined in s. 284 (1)(j) of the MGA:

- (j) *“improvement” means*
 - (i) *a structure,*
 - (ii) *any thing attached or secured to a structure, that would be transferred without special mention by a transfer or sale of the structure,*
 - (iii) *a designated manufactured home, and*
 - (iv) *machinery and equipment;*

[70] Structure is defined in s. 284(1)(u) of the MGA:

- (u) *“structure” means a building or other thing erected or placed in, on, over or under land, whether or not it is so affixed to the land as to become transferred without special mention by a transfer or sale of the land;*

[71] The definition of structure thus includes two components:

- a) The first component is a building.

- b) The second component is an “other thing ...”.

[72] In looking at s. 284 (1)(j)(iv) of the definition of “improvement”, the phrase “machinery and equipment” is found in s. 284(1)(l) of the MGA, but is defined in section 1(j) of the Matters Relating to Assessment and Taxation Regulation, Alta Reg 220/2004 (MRAT):

284(1)(l) “machinery and equipment” has the meaning given to it in the regulations;

MRAT

1(j) “machinery and equipment” means materials, devices, fittings, installations, appliances, apparatus and tanks other than tanks used exclusively for storage, including supporting foundations and footings and any other thing prescribed by the Minister that forms an integral part of an operational unit intended for or used in

- (i) manufacturing,*
- (ii) processing,*
- (iii) the production or transmission by pipeline of natural resources or products or by-products of that production, but not including pipeline that fits within the definition of linear property in section 284(1)(k)(iii) of the Act,*
- (iv) the excavation or transportation of coal or oil sands as defined in the Oil Sands Conservation Act,*
- (v) a telecommunications system, or*
- (vi) an electric power system other than a micro-generation generating unit as defined in the Micro-Generation Regulation (AR 27/2008),*

whether or not the materials, devices, fittings, installations, appliances, apparatus, tanks, foundations, footings or other things are affixed to land in such a manner that they would be transferred without special mention by a transfer or sale of the land;

[73] Turning to linear property, the CARB notes that it is defined at s. 284(1)(k) of the MGA:

- (k) “linear property” means*
- (i) electric power systems, including structures, installations, materials, devices, fittings, apparatus, appliances and machinery and equipment, owned or operated by a person whose rates are controlled or set by the Alberta Utilities Commission or by a municipality or under the Small Power Research and Development Act, **but not including land or buildings**, (emphasis added).*

[74] “Electric power system” is defined in s. 284(1)(g) of the MGA:

- (g) “electric power system” means a system intended for or used in the generation, transmission, distribution or sale of electricity;*

[75] There was no question that the Battle River Plant is producing power into the grid.

[76] The CARB concludes that the definition of machinery and equipment at s. 1(j) of MRAT does pertain to the subject electric power system for these reasons. Firstly, the previous

legislation used the term “equipment” and the term “machinery” without linking these terms either in the *Municipal Taxation Act* or the *Electric Power and Pipeline Assessment Act*. Secondly, s. 1(j) of MRAT specifies that the definition applies to electric power systems except for micro generation systems. Thus, it clearly applies to systems producing into the power grid. Thirdly, s. 8(3) of MRAT also indicates a connection. Fourthly, the definition in s. 284 of the MGA applies to Parts 10, 11 and 12 of the MGA all of which apply to linear property and property.

[77] The CARB considered Mr. Driscoll’s evidence with respect to the term “structure”. Mr. Driscoll stated that even though the word “structure” is contained within the definition of “linear property”, it is not appropriate to go to the definition contained in s. 284(1)(u) of the MGA to find its definition. He stated that the definition in s. 284(1)(u) has no bearing on how an electric power system under linear property is defined because they are two different regulatory schemes, with different assessors, different valuation dates, different physical condition dates, etc.

[78] The CARB acknowledges that there are 2 different schemes (that for linear property and a second for property). However, the CARB is not convinced by Mr. Driscoll’s suggestion that the definition of “structure” is to be found somewhere outside of the MGA. In the *Electric Power and Pipeline Assessment Act*, “works and transmission lines” are defined as

- (i) *the installations, structures, materials, devices, fittings, apparatus, appliances, equipment, plant machinery, ways and easements, constructed or acquired for the use in the generation, transformation, transmission, distribution, delivery or sale of electricity by a person whose rates are controlled or set by the Public Utilities Board or by a municipality,*

but does not include physical land or buildings

[79] In s. 284(1)(k) of the MGA, similar wording is found:

<i>“Works and transmission lines” means</i>	(k) <i>“linear property” means</i>
<p>(i) <i>the installations, structures, materials, devices, fittings, apparatus, appliances, equipment, plant machinery, ways and easements, constructed or acquired for the use in the generation, transformation, transmission, distribution, delivery or sale of electricity by a person whose rates are controlled or set by the Public Utilities Board or by a municipality,</i></p> <p>but does not include physical land or buildings (Emphasis added)</p>	<p>(i) <i>electric power systems, including structures, installations, materials, devices, fittings, apparatus, appliances and machinery and equipment, owned or operated by a person whose rates are controlled or set by the Alberta Utilities Commission or by a municipality or under the Small Power Research and Development Act, but not including land or buildings,</i></p> <p>(emphasis added)</p>

[80] The question then is how to reconcile the inclusion of the word “structure” within the definition of linear property. The CARB is of the view that the definition of linear property can be read harmoniously in light of the definition for “structure” in s. 284(1)(u) of the MGA.

[81] If one looks at the definition of “linear property”, it includes the word “structure” within the first part of the definition, but very clearly excludes buildings. The CARB is of the view that

linear property excludes the first type of “structure” (“building”) as a result of the clear wording of the section. However, “linear property” includes the second component – the “other things”.

[82] In the first argument advanced by the Complainant, it alleges that the entirety of the “structure” for the boiler houses and turbine halls are “linear property” because it falls within the definition of linear property.

[83] In order for the CARB to accept this argument, the Complainant must establish that the “structure” associated with the boiler houses and turbine halls is all “structure” dedicated only to the support of the power plant equipment and further that there is no “building” because it is clear from the definition of linear property that linear property specifically excludes a “building”.

[84] The CARB thus turns to the evidence to determine if the Complainant has met that onus of establishing that the “structure” of the boiler houses and turbine halls is not a building, for if it is a “building”, then it falls within the jurisdiction of the municipal Assessor.

[85] The MGA does not include a definition for “building” under s. 284 of the MGA.

[86] Having examined the definitions provided, the CARB finds that the purpose of a building is to provide:

- a) shelter for people and equipment;
- b) storage space;
- c) a comfortable work environment; and
- d) the protection of equipment from the elements.

[87] The evidence in this hearing indicated that the boiler houses and turbine halls for the 3 units are multi-stories tall, have footings and foundations, and a structural framework with sufficient strength and vertical and lateral design to support their size. There is a roof, walls and lateral support, and there is the appearance and shape (more or less rectangular) of a building.

[88] The Complainant has referred the CARB to *Sogemines Ltd. v. MD of Stoney Plain*, [1971] 5 W.W.R. 481 as support for the proposition that a functional test should be used to delineate between various property types, quoting the following passage:

In my opinion the silos are in their entirety “equipment” and no distinction should be made between the various portions of the silos. One must consider the purpose for which the structure is used as the determining factor and not the nature of the structure.

[89] The CARB notes that the case did not deal with a determination of whether the silos were “linear property” or “property” (which is the situation before this CARB), but rather dealt with the issue of whether the silos were a particular kind of “improvement” (“building” or “machinery and equipment”).

[90] In making its determination of the type of property, the Court found that the silos were essential to the operation of the cement plant, performing functions of (1) air separation and dust collection, (2) testing and providing a containing medium during the testing period, (3)

permitting separation of the 5 kinds of products, (4) facilitating packing and delivery, (5) enabling the use of cheaper power, (6) performing a binning action; and (7) providing storage. The Court noted that the question was whether the rate of assessment of the silos could be decided by determining if their functions came within the definition of an improvement (machinery and equipment) even though the silos might also be in the nature of buildings or structures. Having found that their functions made them equipment, the Court went on to ask whether the silos formed an integral part of the operational unit. The Court found the whole cement plant was an operational unit of which the silos were an integral part and their function was necessary for the production of a quality unit.

[91] The Complainant urges the CARB to accept the functional test set out in *Sogemines* in order to conclude that the “structures” are “linear property”.

[92] The Respondent has urged the CARB to review its cases (*Metals & Alloys Co. v. Ontario Regional Assessment Commissioner, Region No. 11*, (1985) 15 D.L.R. (4th) 250 (C.A.) and *Galloway Lumber Co. v. East Kootenay Assessor, Area No. 22*, (1988) 29 B.C.L.R. (2d) 52 (aff’d 40 B.C.L.R. (2d) 353 (BCCA)). In those cases, the test involves the decision maker asking a series of questions:

- a) What is the item used for?
- b) How is the item constructed?
- c) Why was it constructed in this shape, or of this material or size?
- d) Does it look like a building?
- e) Is it built like a building?
- f) Does something happen within or on this item that is an integral part of the manufacturing process as distinct from happening within or on a piece of machinery that the item encloses?

[93] Certain items from the two lines of cases overlap. Both ask whether the “structures” are integral to the (in our case) “linear property”. The line of cases urged by the Respondent goes further, to ascertain the construction and appearance (among other things) of the “structure.

[94] The CARB notes that the Municipal Government Board in the case of *Talisman Energy Inc. v. Lakeland (County)* MGA 011/02, 2002 CarswellAlta 2171 indicates that not all structures need to be buildings, based upon the MGB’s review of the definition of structure in s. 284(1)(j). The MGB’s review is similar to this CARB’s review in paragraph 71 above. In the *Talisman* case, the MGB indicated that it was necessary to look at the structure itself, both its features and its purpose. In that case, the Board noted the indices were purpose, size, usage, mode of erection and installation, and the historical content of the governing legislation.

[95] In the *Talisman* case, the MGA found as a fact that the meter structure formed a necessary protective function to permit the metering to occur. Based on the evidence, the MGB found that the function of the meter structure was a necessary and integral part of the metering function carried on within it. The meter measured gas flow to determine production and pressure, which results had to be reported to the provincial regulatory authority. The express finding was that the

metering facility, inclusive of the structure protecting it, operated for the purpose of monitoring the pool pursuant to s. 284(1)(k)(iii).

[96] The evidence before the CARB was that from the outside of the Battle River plant, the appearance was like a building. The evidence of Mr. Froc was that the cladding was sandwich panels. There was a roof and cladding, whose purpose was to protect the interior from the elements. The footprint and exterior of the building are rectangular in shape, although the evidence was that the boiler was hung, and that the interior configuration of the floors depended upon the requirements for the process equipment. The units were more or less rectangular in shape, which is common for a building, but which may or may not be efficient for the equipment housed inside. The “structure” looks like a building and the CARB believes that the building and the structure supporting the power plant equipment were designed to be integrated from the outset.

[97] The further question considered by the CARB is whether the Complainant provided evidence that the entirety of the “structure” including the cladding, and roof and the parts identified by Mr. Froc as “non-supporting” were an integral part of the “linear property”. Did the Complainant adduce evidence that the function or purpose of the roof and walls is to support the electrical power system? The evidence on this point came from Mr. Froc, who indicated that the purpose of the cladding was non-supporting, and the roofing system was also non-supporting. The purpose of the cladding was to enclose the interior of the building and to protect it from weather and cold winter conditions. The cladding was mostly to protect the interior or the machinery and equipment from freeze up and the elements in general. There was no evidence that the power plant could not operate in its location in the municipality without the cladding or roof. Mr. Hall also gave evidence that in warmer climates, coal fired electric power generating plants are unclad, showing pictures from Texas and Arizona, which suggests to the CARB that the cladding is not essential or integral to the operation of the linear property if other coal fired power plants operate without them. There was no evidence to show whether the steel structures for these plants are rectangular in shape; are capable from a design perspective to carry a roof and exterior walls; or that the floors of these examples are similar to those present in the subject power plant.

[98] The CARB is of the view that in order to find that 100% of the “structure” is linear, it would need to be convinced that the presence of the roof and cladding were used in the generation, transmission, distribution or sale of electricity. The CARB is not convinced from the evidence that the Complainant has adduced evidence to support a finding that the “structure” in question was integral to or used in the generation of power as required by s. 284(1)(g) of the MGA. There was evidence that the cladding “mostly” protected the interior of the plant, which is the primary function of any building and is not unique to the subject.

[99] Based on the evidence, the CARB does not believe that the Complainant has satisfied the onus to establish that the “structure” falls outside the definition of a “building”. While it may be possible to meet this onus, for the Complainant to have succeeded on its first argument, it would have needed to have gone much further in introducing compelling evidence that this structure is not a building and it is used in the generation of power.

[100] In examining which features make the building viable as a building, the CARB believes that a considerable amount of the existing structural framework has a dual purpose. One purpose and perhaps even the primary purpose is to support the power plant's linear equipment and the other is to support the building. The evidence indicates that the roof system not only rests on the exterior columns and framework, but also on columns and framework located in the interior of the complex including the columns and framework primary designed to carry the boiler. There is no specific analysis before the CARB to show the bearing weight of the roof allowing for maximum snow loads.

[101] The CARB finds that the questioned line items from the Industrial Detail Sheet have all the features of a building and are constructed much like any other building when the shared structural framework is properly apportioned. Their shape, appearance, and function all confirm that they fall squarely within the definition of property under the MGA. In examining the various types of linear property set out in s. 284(1)(k), it is clear that buildings are expressly excluded from all of them, including electric power systems. Because the CARB finds that the questioned line items are buildings, the CARB finds that they are assessable as property.

[102] The CARB then turns to the Complainant's second argument – which is that a portion of the “structure” should not be assessed as property. In this argument, the Complainant argues that approximately 70% of the assessed value should be attributed to “linear property” based upon the analysis conducted by Mr. Froc which divided the Battle River Plant into “supporting” and “non-supporting”. In this analysis, Mr. Froc identified the roof as “non-supporting” as well as the exterior of the building. In C3, Mr. Froc identified the “supporting” (linear) in yellow and “non-supporting” (property) in blue.

[103] He stated that the perimeter columns and interior columns are required for the structural support and cross bracing support of the boiler and other equipment, but that they also support the building. Mr. Froc indicated that the exterior cladding may have resulted in minor upsizing of columns for the top three floors and estimated that this would have a very small impact of possibly 0.2% on the non-supporting cost estimate. He also suggested that the external cladding would make very little difference to the design of the structure based on wind factors as the equipment housed in the structure would require approximately the same wind considerations.

[104] Mr. Froc appears to have identified any structural component having any relationship to supporting plant equipment as being “supporting” even though there may be some dual purpose involved. His analysis was “black and white”. If there was some relationship to linear, it was characterized as supporting, regardless of whether it had a dual purpose. Mr. Froc's view and that of the Complainant was that any attribution the non-supporting components may have on the structural framework was insignificant and did not warrant any allocation where there may be a dual purpose involved.

[105] In reviewing this argument, the CARB notes that the evidence is critical to a determination of whether portions of the questioned buildings should be attributed to linear property or property. The CARB noted the lack of evidence in this area. Although Mr. Froc acknowledged that some of the structural members (columns, beams and girders) had a dual function, the Complainant provided no engineering analysis in support of that conclusion. There

was no evidence before the CARB about, for example, snow loads on the roof, or the impact of wind on the cladding, nor the weight of the building as it might impact on the footings and foundations.

[106] The foregoing areas are capable of careful analysis and are key considerations to the matters in dispute. In the absence of specific evidence, the CARB is not inclined to place much weight on the conclusion offered in relation to the estimates about the impact of the “upsizing” of columns due to wind factor considerations in general.

[107] The Complainant has allocated columns supporting the roof system only down to the top floor level. The Complainant has not included any portion of the columns below that level which also support the roof and the building floors. Nor has it included any cross bracing or lateral support or parts of the foundation as part of the “non-supporting” (property). The CARB notes that the evidence is that this building is over 200 feet high and would require vertical and lateral support as well as foundations or footings to support the building and roof which the Complainant has clearly identified as “non-supporting” (property). In indicating that lateral support should be accounted for, the CARB is not saying that all floors of the building and cross bracing in place would be required for this purpose, but the CARB was not satisfied by the evidence presented.

[108] The Complainant’s analysis does not recognize the proportional features of the structure as being shared and having a dual purpose. This deficiency means that the CARB cannot rely on the analysis because certain features were not costed as part of this model. In this regard, the CARB notes that the building contains a heating system used when the boiler is shut down. This component was not costed. In addition, the sprinklers, electrical and lighting, the elevator, architects and engineers’ fees were not included as part of the Complainant’s costing method. Insufficient evidence was led to allow the CARB to be definitive on each of these features; however, it would appear that some, if not all, may be building or property elements.

[109] The result of the Complainant’s position that items with any relation to linear property were “supporting” lead to the disconcerting result revealed in Exhibit C3 (the plans marked by Mr. Froc) of areas identified in the plans as “non-supporting” which then appeared as suspended without support.

[110] While the CARB does not reject out of hand the methodology used by the Complainant, the CARB is not convinced that the evidence presented by the Complainant provides a full and complete assessment of the building and therefore the analysis cannot be relied upon. The Complainant has ignored the presence of the building, and therefore ignored certain things which are present and should be properly apportioned to the building. The CARB does not accept the Complainant's suggestion that such items would have only a minor effect on the end result.

[111] Based on the foregoing, the CARB thus rejects the Complainant’s second argument of the split between the “supporting” and “non-supporting”.

[112] The CARB turns to the Complainant’s third argument, that if there is a building, then the CARB should look at it as a shell building and determine its value.

[113] The Complainant's assumptions and calculations for the cost of shell buildings lead to a value of \$12, 662,771.

[114] The CARB notes that Exhibit C5 Tab M does not provide specifics about what was included in the valuation. In the CARB's view, it is not possible to have a 200 foot high shell building without some type of lateral support and we are not convinced that the shell building costing approach applied by Mr. Hall adequately addresses the subject from a structural standpoint. Other concerns with the shell building cost scenario shown in exhibit C5, Tab M include the starting point where the light industrial building category (454) is selected. There is no evidence that the light industrial/ warehouse category is appropriate for the use and height of the subject buildings. It is not clear how the Complainant's calculations deal with the floors or lateral support required.

[115] In light of the foregoing, the CARB finds that the shell building alternative as proposed by the Complainant does not produce a reasonable estimate of the subject building market value. This is not to suggest that a shell building approach is not one which could yield a correct and equitable value, but rather that has not in this instance.

Issue 2

[116] As the CARB has concluded that the 2010 assessment does not include components which are not assessable as "property", it does not need to address issue 2.

Issue 3

[117] The Complainant argues that the assessment should be reduced by approximately \$1.8M on the basis that the 2003 agreed upon reduction in this amount was not removed from the assessment. The Complainant has argued that the current assessment erroneously includes the sum of \$1,801,484 which was the amount referenced in Exhibit R1, Tab 2.

[118] In 2003, the parties agreed that AEC would report a linear assessment increase for 2003 of the approximately \$1.8M for taxation in 2004. AEC took the position in the hearing that the assessment in question in this hearing must be reduced by this amount because it had not previously been done.

[119] The Respondent argues that the agreed assessment in 2002 already reflects the change and that no further reduction is required.

[120] The CARB has reviewed carefully the evidence of Mr. Hall, Mr. Willoughby and Mr. Zeiner in relation to this issue. In addition, the CARB has reviewed the wording of the December 2, 2003 letter (Exhibit R1, Tab 2) and Exhibit C2, Tabs H and I.

[121] The CARB concludes that the approximately \$1.8M should not be removed from the 2010 assessment. Having reviewed the evidence, the CARB finds that this amount had been dealt with by the parties in 2003. The letter clearly indicates that AEC is prepared to accept the valuation figure of \$43,781,484 (prepared by Mr. Zeiner). There is no limitation or condition on that amount. The wording in the letter states:

In the event that the Assessment Review Board accepts this agreed to valuation, we will agree to the following assessment and tax procedures on behalf of ATCO Power Ltd.:

1. We will report a linear assessment increase for 2001 of \$1,801,484 (for taxation in 2004).

...

[122] At page 2 of the letter, Mr. Gagne, of AEC Valuations (Western) Inc. states:

These provisions are provided as an understanding should the Assessment Review Board accept the revised Building and Structures Assessment for the 2002 assessment year of \$43,781,484.

[123] If there had been a requirement that an additional amount be removed from the assessment, the CARB believes that it would have been reflected in the letter, which was very specific about the amount. The evidence before the CARB was that the 2002 assessment year was, in fact, \$43,781,484, which reflected the agreement between the parties.

[124] The assessment in question should not be decreased by \$1,801,484. This issue does not appear as an issue on the Complaint form.

[125] The CARB does not accept that the assessment should be reduced by the \$1,801,484.

Issue 4

[126] The Complainant presented the CARB with its calculation regarding its proposed market value. This value is independent of the question as to whether the assessment includes item that may be linear property.

[127] The Respondent urged the CARB to confirm the 2010 assessment in the amount of \$59,318,860.

[128] Mr. Hall stated that the first step in his analysis was to compare the 2002 valuation with the list of items set out against the current 2010 Industrial Detail sheet.¹ The items set out in that 2002 list do not match the items listed in the 2010 industrial detail sheet. However, he was able to recreate the 2002 Assessment benchmark base value.

[129] Having verified that 2002 value, Mr. Hall then presented the CARB with his calculations for what the Complainant argued is the correct market value assessment, prior to any linear property correction (see Exhibit C2, Tab S, page 2) – an amount of \$52,9564,410 which he submitted reflected the correct 2010 base value in compliance with the Shaske & Zeiner benchmarking report and the extraction of the Unit #5 turbine and generator footing costs as ordered by the County of Paintearth No 18 2002 Assessment Review Board.

[130] The CARB acknowledges the difficulty in reconciling the 2002 list of items against the 2010 Industrial Detail sheet. The CARB notes that the municipal assessor did not provide evidence to reconcile the 2002 list against the 2010 Industrial Detail Sheet. The only evidence

¹ For the 2002 Valuation, see Exhibit R1, Tab 3 page 2. See also, Exhibit C2, Tab R.

before the CARB on this point was that provided by the Complainant in Exhibit C2, Tab R, page 2, which the Board accepts as an accurate reconciliation of that 2002 list, with one exception. The CARB does not accept Mr. Hall's breakdown of item 9 identified as the Unit #5 Boiler Building into line 9a and 9b. In the 2003 Shaske & Zeiner report (Exhibit C2, Tab I, page 3), the value of the Unit #5 Boiler Building is set out as \$20,797,307. Mr. Hall gave evidence that this figure should be adjusted into a line 9a – Unit #5 Boiler building with a value of \$18,995,929 and a line 9b Turbine Footings with a value of \$1,801,378. In light of the CARB's decision in issue 3, the CARB rejects this breakdown and finds the value of the Unit #5 Boiler buildings should be \$20,797,307.

[131] The CARB has used Exhibit C2, Tab R, page 3 as its starting point. The 2002 figures must then be adjusted to reflect 2010 figures.

[132] The Complainant's evidence provides the background details to support its calculations for 2010 benchmark base value. The CARB prefers this evidence to that of the municipality, which provided no details as to how each component of the assessment was derived, nor a reconciliation of the 2002 to 2010 lists. The Complainant has used the same methodology as the assessor used, but reflects the 2002 inventory and the items added since 2003.

[133] However, given the CARB's ruling in relation to Issue 3 (the \$1.8M issue) and the comments made in paragraph 130 (above), the value in Exhibit C2, Tab S, page 2 must be adjusted upwards by the value of the Turbine and Generator Footings (line 9b) whose cost is \$1,417,850 multiplied by the base year modifier for 2010 of 2.34 for a total of \$3,317,769. This must be added to the total non-linear assessment value and increases the 2010 benchmark base value to \$56,282,179.

[134] The CARB notes that the assessor used the 2002 value as its base, but then modified it by the Alberta Manual which stopped being updated in 2008. The CARB understands that subsequent to 2008 the value has been modified based on the machinery & equipment modifier, which the CARB was advised was a 3 year average. The CARB prefers the Complainant's valuation as set out in paragraph 130 above, because of its concerns about the use of the 1984 Alberta Manual which has not been updated since 2008. The CARB has concerns about the use of the machinery and equipment modifier because it may not be an accurate modifier for property like the subject. While the CARB understands that the municipality had to use some modifier to bring the value to 2010, there is no hard evidence to persuade the CARB that the machinery and equipment modifier is appropriate in this case.

[135] The CARB has examined the valuation provided by Mr. Zeiner, but is not prepared to accept the Alberta Factor adjustment. There was no evidence presented by the Respondent that the Alberta Factor was used in other jurisdictions, nor that it is a commonly used adjustment. By contrast, the Complainant provided evidence that other jurisdictions did not modify the Marshall & Swift valuations by the Alberta factor. With the Alberta Factor removed, the resulting value is substantially below the current assessment.

[136] As a result of the above, the CARB finds the 2010 assessment should be reduced to \$56,282,179.

Issue 5

[137] The Complainant raised an issue concerning equity. However, the Complainant did not bring forward any evidence in this regard. There was no evidence put forward to the CARB of specific examples of other similar properties within the municipality which show that the subject assessment is inequitable. In the absence of evidence, the CARB cannot make a determination on this question and finds that the Complainant has not established that the subject was not treated equitably.

DECISION SUMMARY

[138] The CARB finds that:

- a) The 2010 assessment does not include components of the facilities which are not assessable as “property”;
- b) As a result, the CARB does not need to change the assessment to remove components not assessable as “property”.
- c) The CARB does not order the assessment to be reduced by \$1,801,484.
- d) The CARB reduces the 2010 assessment to \$56,282,179.
- e) The Complainant produced no evidence that it had not been treated equitably.

It is so ordered.

Dated at the City of Lethbridge, in the Province of Alberta, this 4th day of August, 2012.



P. Petry, Presiding Officer

APPENDIX "A"

DOCUMENTS RECEIVED AND CONSIDERED BY THE CARB:

NO. ITEM

EXHIBIT #	TITLE INFO	DATE
C1	Complainant Disclosure	November 28, 2011
C2	Alberta Power	November 24, 2011
C3	Expanded / Enlarged Drawings	November 24, 2011
C4	Froc Engineering Letter	March 25, 2012
C5	Alberta Power Complainant Rebuttal	March 28, 2012
C6	Rebuttal Brief Of Complainant	March 28, 2012
C7	CV Of Cam Hall	May 7, 2012

C8	Mersey Paper	May 7, 2012
C9	Horizontal Plan	May 8, 2012
C10	Vertical Sections	May 8, 2012
R1	Terry Willoughby Submission	February 28, 2012
R2	Kevin Zeiner Submission	February 28, 2012
R3	Doug Heath CV	February 28, 2012
R4	Dan Driscoll Submission	February 28, 2012
R5	Legal Argument	February 28, 2012
R6	Volume Of Legislation	February 28, 2012
R7	Volume Of Authorities	February 28, 2012
R8	Volume Of Documents	February 28, 2012
R9	Respondents Preliminary Issue Regarding Rebuttal Evidence	May 3, 2012
R10	CV Of Dan Driscoll	
R11	2003 AEC Power Review	February 28, 2012
R12	Site Tour Document	May 7, 2012
R13	1984 Assessment Manual	May 10, 2012
R14	Calculator Method Excerpt From Marshall & Swift	May 11, 2012
D1	Notes Of Site Tour	May 9, 2012

APPENDIX ‘B’

ORAL REPRESENTATIONS

PERSON APPEARING CAPACITY

- | | | |
|----|----------------|-----------------------------------|
| 1. | B. Dell, | Counsel for the Complainant |
| 2. | C. Hall | Representative of the Complainant |
| 3. | R. Froc | Witness for the Complainant |
| 4. | R. Papuha | Witness for the Complainant |
| 5. | C. M. Zukiwski | Counsel for the Respondent |
| 6. | T. Willoughby | Assessor for the Respondent |
| 7. | D. Driscoll | Witness for the Respondent |
| 8. | K. Zeiner | Witness for the Respondent |

For MGB Use Only

Subject	Type	Sub-type	Issue	Sub-issue
CARB	electric power plant	generating system	property vs linear property	building / structure