BOARD ORDER: MGB 218/96

IN THE MATTER OF THE "Municipal Government Act" being Chapter M-26.1 of the Statutes of Alberta 1994, **the Act.**

AND IN THE MATTER OF AN APPEAL against a linear assessment imposed by the County of Warner and the County of Lethbridge

BETWEEN;

Irrigation Canal Power Co-operative Ltd.-Appellant

-and-

The County of Warner and the County of Lethbridge - Respondents

BEFORE

P. VanBelle, Presiding Officer
Dr. E. Thompson, Member
S. Cook, Member

Upon Notice being given to the effected parties, a hearing was held in the City of Lethbridge, in the Province of Alberta on May 8,9 and 10, 1996.

This is an appeal pursuant to Section 488(1) of the Act to the Municipal Government Board from a linear assessment imposed by the County of Warner and the County of Lethbridge with respect to property assessments entered in the roll of the Respondent municipalities as follows:

County of Warner, Assessee Code	06-0340	19,308,390
County of Lethbridge Assessee Code	06-0204	7,013,340

BACKGROUND

1. The Irrigation Canal Power Users Cooperative Limited (Irrican Power) was formed by the water users of the St. Mary River, Raymond, and Taber Irrigation Districts. Irrican was initially incorporated on December 18, 1990.

2. Irrican Power has built two electric power generating plants grafted onto their existing irrigation system. The Raymond Plant is located in the County of Warner, the Chin Plant is located in the County of Lethbridge.

3. Both plants began operating in 1994. Linear assessments were filed against both plants for the 1995 taxation year.

4. On July 26, 1995 Irrican Power filed appeals against both assessments with the Municipal Government Board. The grounds for the appeals are that (a) these properties are not assessable and (b) that the assessment is not fair and equitable. These appeals are the subject of this Board Order.

SUMMARY OF APPELLANT'S POSITION

1. The appellant submitted that (a) these properties are non-assessable, and (b) the assessment are not fair nor reasonable. In support of these positions Mr. Brown, Manager of Irrican Power, provided the following testimony:

    1.1. The irrigation in this area started around 1903. In 1985 the concept of using the water flow in the irrigation systems for the generation of electricity was seriously considered.

    1.2. Several sites were examined. Following extensive engineering analysis two sites were selected on the basis of the difference in elevation providing natural head to drive the turbines.

    1.3. Extensive discussions were held with the water users of each Irrigation District. The water users provided strong support for the concept, anticipating a profitable return on the investment. This would allow the Irrigation Districts to lower the water rates to water users. The water users could use this saving to offset the cost of power required to operate their irrigation pumps.

    1.4. The capital cost for the construction of these plants would be borrowed and repayment guaranteed by the revenue from water rates charged to water users by the Districts

    1.5. In order to arrange the financing, Cabinet approval was obtained on February 6, 1992 under section 41.(1) of the Irrigation Act

    1.6. Construction was started in 1992. In 1994 both plants were completed. The Raymond Plant was commissioned on May 14, 1995. The Chin Plant was commissioned on April 27, 1994.

    1.7. The Irrican power plants rely almost entirely on the flow of water required for irrigation. The normal production period is from April to October 15 depending on the availability of water and the demand for water to irrigate.

    1.8. Irrican Power is managed by a Board of Directors appointed by the Boards of the three participating Irrigation Districts.

    1.9. Irrican Power has no staff. Operations are managed by the Manager of the St. Mary River Irrigation District and his staff. The staff of the Raymond Irrigation District provide accounting services.

    1.10. Both plants are located on lands that were part of the irrigation system.

    1.11. A significant portion of the power is used by the St. Mary River Irrigation District for its own use, primarily by lift pumps that elevate irrigation water for the Forty Mile Reservoir.

    1.12. The amount of electricity produced by these plants is almost equal to the demand for power for irrigation purposes by water user and Irrigation Districts.

    1.13. Water user members are switching over to electricity from gas and oil to operate their irrigation pumps. Currently about 50% of the power used for this purpose is electricity.

1.14. Both plants are an integral part of the irrigation system and its operation.

1.15. The power is distributed from the plants to the lift pumps and to the water users through the TransAlta power grid.

1.16. The distribution of electricity is achieved by selling the power to TransAlta at a rate fixed by the Energy Utilities Board (EUB). This arrangement is required under the Small Power Research and Development Act, and is a cost effective way to distribute the power.

1.17. The sale of this power allows the Irrigation Districts to reduce the water rates to water users. The water users repurchase the power from TransAlta to operate their irrigation pumps.

1.18. Pre-engineering reports estimated the energy production capacity of these plants in Megawatts (MW) as follows:

Raymond	61.0 MW
Chin	38.5 MW

1.19. Actual Production in 1994 /1995 was as follows:

Raymond	52.3 MW	55.2 MW
Chin	31.3 MW	40.7 MW

2. Mr. Orrin Hart, a farmer in the M.D. of Willow Creek and president of the Small Power Producers Association of Alberta, testified that he has constructed on his farm a 65 kilowatt wind charger.

2.1. Under the provisions of the Small Power Research and Development Act he feeds the power generated into the local power grid. The power he needs to operate his farm is then purchased from the local power grid. His preferred method would have been to install a meter that could run backward when he produces surplus of power. However, this is not permitted under the Small Power Research and Development Act.

2.2. Mr. Hart testified that his wind charger is not assessed by the M.D. of Willow Creek.

3. Mr. Gilleski, Administrator for the Lethbridge Regional Hospital, testified that the Hospital operates a 1.1 megawatt cogeneration plant.

3.1. This plant provides electricity for the hospital and a regional laundry service. The plant was built to save the Regional Hospital a significant amount in operating costs.

4. Mr. Gagne, President of AEC Valuations (Western) Ltd. and an expert in property taxation and valuation , testified that he has analyzed the depreciated replacement costs for these plants.

4.1. The depreciated replacement cost is the difference between the cost to construct and the value of these plants on the market. This difference is commonly known as economic obsolescence.

4.2. The total cost to construct these plants, as reported by Irrican Power was $ 44, 806, 326

4.3. The market value can be established by calculating the annual anticipated revenue, less the operating cost, divided by an appropriate capitalization rate. The result is a value that a prudent buyer would place on these plants.

4.4. To establish this value he took the average of the power sales of theses plants during 1994 and 1995, subtracted the average operating cost for these two years and then divided the net operating income by a capitalization rate of 13%, as follows:

Average Annual Income	$4,742,727
Less Expenses (including a 4% management fee of $162,460)	843,671
Net operating income	3,899,056
Divided by a capitalization rate of 13%	
Market value income approach	$29,992,738

4.5. He then compared the actual cost of construction with the market value based on the income approach and calculated that to properly recognize economic obsolescence, a depreciation of 33% is required.

4.6. This 33% depreciation was applied to the assessable portion of both plants as follows:

Raymond Plant, County of Warner, 19,308,390 less 33.3% for a suggested assessment of $12,872,360

Chin Plant, County of Lethbridge, $7,013,340 less 33.3% for a suggested assessment of $4,675,560

4.7. During the hearing Mr. Gagne recalculated the amount of depreciation based on higher production estimates and higher annual costs. (exhibit 14 page 5) Based on these parameters the Raymond Plant should receive depreciation of 22% and the Chin Plant 25%

5. In summation Mr. MacLachlan argued that these plants are exempt because production of electricity using irrigation water is an incidental use to the operation of an irrigation system. He noted the following:

5.1. Section 298 (c) of the Act directs that no assessment is to be prepared for irrigation works as defined in the Irrigation Act.

5.2. The Irrigation Act Section 1(m) defines irrigation works as any structure, device or thing used with respect "to supplying carrying or delivering water or any other purpose connected therewith or incidental thereto, and without derogating from the generality of the foregoing, includes any dike, dam, weir, [etc.]".

5.3. "Structure, device or thing" is followed by the phrase "and without derogating from the generality of the foregoing" this clearly shows that a wider sense is intended and the rule *Ejusdem Generis* does not apply. He cited from the Canadian Encyclopedic Digest (exhibit 1 tab 21).

5.4. The Irrigation Boards had the authority under this definition to proceed with these plants, however to arrange financing Cabinet approval was obtained under section 41 (1) of the Irrigation Act.

5.5. The plants are owned and operated by the water users of the Irrigation Districts through the Board of Directors.

5.6. The power plants are an integral part of the overall irrigation system creating electricity for the purpose of irrigating.

5.7. These plants are not unlike the cogeneration plant at the Lethbridge Regional Hospital.

5.8. The definition of irrigation works in the Irrigation Act is broad enough to encompass these small irrigation plants.

6. The plants are also exempt from taxation because they are owned and operated by a farm cooperative (the Irrigation Districts) and thus part of a farming operation. Mr. MacLachlan noted that:

6.1. No assessment is to be prepared for linear property used exclusively for farming operations,. Section 298 (q) the Act.

6.2. Mr. Hart, a farmer, has testified that his wind charger is not assessed. He uses the identical method for the exchange of power that is used by Irrican and its water users as required by the Small Power Research and Development Act and regulations under that Act.

6.3. The amount of power produced by these plants is almost identical to the power required by the Irrigation Districts and by the water users to operate their sprinkler system.

6.4. In essence there is a homogeneous pool of electrons which is fed by these plants and from which the water users draw their power for irrigating their fields.

6.5. In the Ontario Hog Producers Cooperative v. MNR 196, Tax A.B.C. 266 The Tax Appeal Board ruled that the Hog Producers Cooperative is classed as an agricultural organization. Irrican is similarly an agricultural association.

7. The assessment has been prepared under the new legislation. However, there is no transitional regulation to bridge the authority to tax linear property from the old legislation to the new MGA (the Act.) Therefore the assessment is improper and cannot be imposed. Mr. MacLachlan pointed out that:

7.1. The new MGA came into force on January 1st 1995. This Act repealed the Electric Power and Pipeline Assessment Act and consequently the Regulations under that Act.

7.2. The transitional Regulation 372/94 under the Act provides for bridging the assessment requirements between the old and the new legislation. There are no provisions in this regulation for bridging linear assessment.

7.3. Within the Division of the Department of Municipal Affairs charged with preparing linear assessment there was confusion as to the way the assessment was to be prepared.

7.4. There is a fundamental principle in taxation legislation that the taxpayer should be able to know the statute under which he is being taxed. Because of the change in legislation and in the absence of specific transitional regulation the owner could not

know which legislation he was being taxed under. Therefore these plants should not have to pay taxes for the taxation year 1995.

7.5. Further, the assessment was not prepared properly since there were no regulations under the new Act that the assessors could have used to prepare his assessment.

8. Mr. MacLachlan also argued that the assessment should have been prepared under the old rules and then these plants would have been exempt. In support of this contention he noted the following:

8.1. The value had to be established on October 31,1994 for taxation year 1995. The new MGA only came into force January 1 1995.

8.2. Section 24 (o) of the Municipal Taxation Act, which was in effect on October 31 1994, directs that property assessable under the Electric Power and Pipeline Assessment Act be assessed under that Act.

8.3. Section 2(1).of the Electric Power and Pipeline Assessment Act requires assessments to be prepared only under that act and no other act for plant and machinery used in the generation of electricity by a person whose rates are set by the Energy and Utilities Board.

8.4. The rate for the sale of electricity has been set by the Energy and Utilities Board.

8.5. However, the Electric Power and Pipeline Assessment Act Section 3(1) (b) provides for an exemption from assessment for works that are "owned or operated by an association (as defined in the Cooperative Association Act Or the Rural Utilities Act) having as its principle object the supplying of gas or electricity to its members;".

8.6. Irrican Power is a rural cooperative having as its principle object the supplying of electricity to its members. Therefore these plants are exempt from assessment.

8.7. Section 31(1)(e) of the Interpretation Act clearly indicates that an owner is entitled to the rights under the Electric Power and Pipe Line Assessment Act despite the fact that that act has been repealed.

9. If in the event the Board finds that these plants are assessable then there is convincing evidence that the assessment value prepared by the assessor is too high and does not take into account economic obsolescence inherent in these plants. Mr. MacLachlan argued this position as follows:

9.1. There is compelling legal precedent for granting reduction due to economic obsolescence. Several cases from the B.C. Supreme Court clearly illustrate this.

9.2. These cases support the concept that obsolescence can be established by considering the net revenue these plants can produce on which a prudent purchaser would base his price for these plants as going concerns.

9.3. Economic obsolescence is defined as a loss in value due to external circumstances. These could include the following: rate regulation by an external body, the availability of water, the demand for water for irrigation purposes, and annual variation in the weather.

9.4. The testimony of Mr. Gagne sets out the seven steps required to arrive at the amount of economic obsolescence. The method used is to capitalize the net income these plants can generate.

9.5. The respondent's expert used the same methodology.

9.6. However the respondent's expert did not properly estimate the operating cost for such plants, nor did he use the correct information about the potential power these plants could produce.

9.7. A recalculation by Mr. Gagne of the economic obsolescence based on higher income parameters and higher expense estimates results in economic obsolescence for the Chin plant at 22% and for the Raymond plant of 25%. This results in the following assessment values:

> Chin Plant, County of Lethbridge, $7,013,340 less 22% for a suggested assessment of $5,260,005.
>
> Raymond Plant, County of Warner, 19,308,390 less 25% for a suggested assessment of $15,060,544.

9.8. In summary Mr. MacLachlan stated that the Board should find that these plants are exempt from taxation for at least one year.

9.9. However in the event the Board found the plants assessable, the assessment should be reduced to the amount calculated by Mr. Gagne in paragraph 9.7 above.

SUMMARY OF THE RESPONDENT'S POSITION

1. The respondent submitted that the two plants are assessable and that if economic obsolescence is present the percentage would be very small. In support of these positions the following factors were brought forward:

2. Mr. W. Kipp, an accredited appraiser and assessor of the firm of Bryce Kipp and Nelson Ltd. presented his appraisal in a self contained report. He indicated the following:

2.1. The purpose of his appraisal was to estimate the market value of these two plants as at October, 1994. His analysis was prepared to determine whether or not these plants suffer from significant economic obsolescence that would impact on the assessment values.

2.2. The assessed value is to be the replacement cost of the plants less depreciation for economic obsolescence. To establish the depreciated replacement cost the income approach is the most valid. The replacement cost approach would not measure the depreciation and was not used. The direct comparison approach could not be used since there have not been any sales of power generating plants such as these.

2.3. Depending on factors used these plants appear to have a abnormal obsolescence in the range of 5.5% to 14%, with the most probable rate being 8% or 9%.

2.4. Several projected production rates were examined in addition to the 1994 actual production as follows:

The total potential production could be:

Raymond Plant	92.4MW
Chin Plant	56.5MW

Monenco Agra Ltd. prepared an estimate of potential production for TransAlta Utilities

Raymond Plant	64.0MW
Chin Plant	39.0MW

2.5. Based on the information derived from the appellant the average annual production potential of these plants was estimated as follows:

Raymond Plant	74.5MW
Chin Plant	51.4MW

2.6. At these production rates these plants would generate a combined gross revenue of $6,811,190.

2.7. Typically, the total normal operating costs amount to two percent of the capital cost for small hydro generating plants.

2.8. A detailed review of the cost to operate resulted in a stabilized annual expense of $481,000 for the Raymond plant representing 1.77% of the capital cost. For the Chin plant the stabilized annual expenses would be $334,000 representing 1.89% of the capital costs.

2.9. A thorough analysis was conducted of various indicators of capitalization rates for these types of plants. It was concluded that a knowledgeable and prudent investor looking to acquire one or both plants would utilize a capitalization rate of 12.5 to 13% based on the net operating income.

2.10. Based on the production level derived from the appellant he calculated the value of both plants as follows:

Estimated Annual Income	$6,811 190
Estimated Annual Operating Expense	815, 000
Net operating income	5,996, 190
Capitalized at 13%	
Indicated market Value	$46, 125,538

2.11. A revised estimated market value was prepared during the hearing using an estimate of electricity production prepared by Monenco Agra Ltd. for TransAlta. This resulted in the following value estimate:

Estimated Annual Income	$5,680,500
Estimated Annual Operating Expense	815, 000
Net operating income	4,865,500
Capitalized at 13%	
Indicated market Value	$37,426,000

2.12. A further analysis, also based on the Monenco production estimates, using a Discounted Cash Flow method (Net Present Value) resulted in values of $41,788,169 or $42,325,771. These values indicate an economic obsolescence of 6.7 or 5.5% respectively. (Exhibit 10)

3. Mr. Schmidt, assessor with Alberta Municipal Affairs, described the basis for preparing the assessment as follows:

3.1. The assessments were prepared by authority of section 292 of the Act.

3.2. The specifications and characteristics of the plants were taken as of October 31, 1994 as required by section 292(3)(a) of the Act, and as specified in section 5(2) of the Electric Power and Pipe Line Assessment Act.

3.3. The information about the costs of construction was supplied by Irrican's engineer in a letter dated February 6, 1995. A follow up letter, dated February 27, 1995 slightly altered the cost allocation between assessable and non assessable costs.

3.4. The value of the assessment was calculated from construction costs supplied by Irrican and adjusted based on Regulation #74/91 under the Electric Power and Pipe Line Assessment Act.

3.5. These assessment were placed on the rolls of the respective municipalities in accordance with section 308(2.1) of the Act.

3.6. The assessments were prepared during February of 1995 following receipt of the construction information.

3.7. The Minister, by authority of section 605 of the Act, directed all Alberta municipalities to enter linear assessment on the assessment roll by March 31, 1995.

3.8. Assessment notices, dated March 17,1995, were sent out to Irrican and the two counties citing the Act. These notices were amended as to form by a subsequent notice dated July 6, 1995, which changed the words "works and transmission lines" to "linear property". [quotation marks are in the notices] The former is used in the Electric Power and Pipe Line Assessment Act while the latter is used in the Municipal Government Act (the Act).

4. In summation Mr. Burgess argued that these plants are assessable. On the question of exemption under Section 298(c) of the Act he noted the following:

4.1. Section 298(c) of the Act exempts irrigation works as defined in the Irrigation Act .

4.2. The Irrigation Act in Section 1(m) defines irrigation works as "supplying, carrying or delivering water or obtaining a supply of water or any other purpose in connection therewith or incidental thereto,"

4.3. The principle rule of statutory interpretation is that the meaning of the word is influenced by the words with which it is associated. He referred to Construction of Statutes (tab 16 exhibit 3) and the Latin maxim of *noscitur a sociis.*

4.4. He claimed that a careful reading of the operative clause cited above shows that these power plants can not be construed to fall with the words "incidental thereto".

4.5. Furthermore, Section 44 of the Irrigation Act, which defines the power and duties of a Board of Directors of an Irrigation District, does not include the construction and operation of electric power generating plants.

4.6. Section 44.1 of the Irrigation Act does provide authority for the Board of directors to undertake extended activities but only if approval is obtained from the provincial cabinet.

4.7. In fact, the Irrigation District have applied for approval under Section 44.1. The approval was received prior to construction on February 6, 1992 by Order in Council 77/92.

4.8. Seeking Cabinet approval under Section 44.1 is a tacit admission by the appellant that construction and operation of these plants are not included in the powers available to the Board of Directors, nor included in the definition of "irrigation works" in Section 1(m) of the Irrigation Act.

4.9. Section 44.1(5) of the Irrigation Act specifically excludes extended activities from exempt status simply because an irrigation district has a full or part ownership in that venture.

4.10. For these reasons Section 298(c) of the Act does not provide exempt status for these plants.

5. Mr. Burgess discounted the claim that these plants are exempt under Section 298(q) of the Act . In support of this position he noted the following:

5.1.1. Section 298(q) of the Act exempts from assessment "linear property used exclusively for farming operations".

5.1.2. Irrican has entered into agreements with TransAlta Utilities to sell the power produced by these plants.

5.1.3. The power is fed into the provincial power grid and can be consumed by anyone connected to that grid. The power can not be tracked through the grid to water users of the Irrigation Districts.

5.1.4. The exemption in Section 298(q) is intended for persons like Mr. Hart who produces power on his farm for farm use.

6. The assessments were properly prepared under the Act for purposes of the 1995 taxation year. The Act provides ample authority for this. Mr. Burgess supported this claim as follows:

6.1. The assessor had the clear duty to assess these plants under Section 292 of the Act .

6.2. The fact that the valuation date is in the previous year is irrelevant and does not place the assessment under the Electric Power and Pipe Line Assessment Act .

6.3. Section 305(2) of the Act requires that where an assessment is omitted then "an assessment for the current year only must be prepared and an assessment notice must be prepared and sent to the assessed person". This buttresses the duty of the assessor and municipality to assess these plants.

6.4. The assessment was properly prepared using the Electric Power and Pipe Line Assessment Act and Regulations. These remain in effect according to the Section 32(1)(e) of the Interpretation Act, which directs that Regulations remain in force "so far they are not inconsistent with the new enactment."

6.5. Section 32(1)(f) of the Interpretations Act reinforces the authority of the assessor to use previous Regulations to establish the assessed values.

6.6. Furthermore Section 293(2) of the Act directs the assessor, in the absence of regulated procedures, to "take into consideration assessments of similar property in the same municipality in which the property that is being assessed is located."

7. Mr. Burgess discounted the claim for exemption under Section 3(1)(a) of the Electric Power and Pipe Line Assessment Act as follows:

7.1. Section 3(1)(a) of the Electric Power and Pipe Line Assessment Act exempts property from assessment when it is "owned or operated by an association (as defined in the Co-operative Associations Act or the Rural Utilities Act) having as its principal object the supplying of gas or electricity to its members."

7.2. The principal object of these Irrigation Districts and Irrican is to supply irrigation water to their water users. The production of electricity is only a secondary activity.

7.3. The Board of Directors of Irrican is made up of directors from the three irrigation districts. Persons who are water users within the Irrigation Districts, but who are not members of the Board of Directors of Irrican, can therefore not be considered members of Irrican. Therefore, Irrican can not claim to be providing electricity to its members.

7.4. The water users in the districts are, in realty, analogous to citizens in a municipality.

8. Mr. Burgess also noted that the assessment and taxation of these plants is consistent with the treatment of similar property owned and operated by other public authorities. For example, Section 362(b)(iii) of the Act specifically provides that municipally owned electric power systems are not exempt from taxation. Therefore his interpretation of Section 298(c) of the Act (and the relevant provisions of the Irrigation Act) is consistent with what appears to be the general intent of the Legislature in respect of the assessment and taxation of electric power plants.

9. The only matter at issue is whether these plants suffer from economic obsolescence and if so what the amount of obsolescence should be. Mr. Burgess provided the following comments on this issue:

9.1. The amount of obsolescence would be very small.

9.2. There were two appraisals submitted on these plants. One by Bryce Kipp Nelson Limited, on behalf of his clients, the other by AEC Valuations (western) Ltd. on behalf of the appellant.

9.3. The appraisal submitted by AEC on behalf of the appellant is fatally flawed because it uses information generated after the evaluation date of October 31, 1994. In support of this contention he cited the ruling by the Alberta Court of Queens Bench on the Shell Case (exhibit 17)

9.4. The AEC appraisal in calculating the net income included several operating costs which are not generally accepted as normal annual expenses. The costs that should not have been included are the following:

Reserve for replacement costs

Management fees There is nothing left to manage - the plants are operating. There is also no evidence presented that this is a common or universal cost in the utility industry.

Market study to analyze future potential for production of electricity.

9.5. The capitalization rate should be at the lower end of the 12.5 to 13% range.

9.6. Using the Discounted Cash Flow Method, as Mr. Kipp has shown, clearly indicates that the market value supports the assessment value for these plants.

10. In conclusion he noted that there may be economic obsolescence inherent in these plants justifying a depreciation of 5 to 9 %, with the most probable depreciation rate being 7%.

FINDINGS OF FACT

Upon hearing and considering the evidence presented by the parties shown on Appendix A and upon having read and considered the documents shown on Appendix B attached hereto, the Board finds the facts to be as follows:

1. Irrican is a co-operative venture owned by the members of the St. Mary River, Raymond, and Taber Irrigation Districts.

2. The Irrigation Districts are regulated under the Irrigation Act RSA 1980 Chapter 1-11 as amended and the Regulations under that act.

3. The Raymond and Chin Power Plants were grafted onto the existing irrigation systems owned by these Districts.

4. The plants produce power when the irrigation system is operating - normally between April and October each year.

5. The water used to generate electricity is almost entirely used for irrigation purposes by members of the Irrigation Districts.

6. The electricity produced by these plants is sold to TransAlta Utilities and fed directly into the provincial power grid.

7. Water users purchase power from the TransAlta to drive their irrigation pumps. The Irrigation Districts also purchase significant power from TransAlta to operate the irrigation system.

8. The amount of power produced by these plants is almost identical to the power consumed for irrigation purposes by the water users and the Districts.

9. The operation of these plants fall under the Small Power Research and Development Act Chapter S-13.75 RSA, and the Regulation under that act.

10. The Small Power Research and Development Act allows construction of plants with a name plate capacity 2.5MW. Plants larger then 2.5 MW are permitted only if they are pilot projects within the meaning of the regulation under this act. Both the Raymond Plant and the Chin Plant are larger then 2.5MW and are considered pilot plants.

11. Power plants authorized under the Small Power Research and Development Act are required to feed the power into the provincial power grid and to sell the power produced to the local utility.

12. The rate received by Irrican from TransAlta for the electricity produced is set by the Public Utility Board of Alberta.

13. By October 31, 1994, the valuation date in the Act and Electric Power and Pipe Line Assessment Act both plants had operated for one full season.

14. The Chin plant had a short period of downtime due to start up difficulties.

15. Various projected production and revenue rates were submitted.

Source	annual production Megawatts	annual revenue millions $
Predesign engineering reports Exhibit 8		5.2
Monenco Agra Inc. study for TransAlta Utilities	103.0	5.5*
1994 Actual	83.7	4.3
Appellant's appraisal	89.7	4.8
Appellant's revised calculation Exhibit 14		5.5
Respondent's appraisal	125.9	6.8
Respondent's revised number	105.0	5.7

(*calculated from the production figures prepared by Monenco)

16. Estimating the operating costs with only the start up year as a guideline meant that it was based largely on judgment. Various costs to operate were submitted as follows:

Source	annual operating costs 000$
Appellant's appraisal (including 4% management fee)	843.7
Appellants revised calculation Exhibit 14	975.0
Respondent's appraisal	815.0

17. These plants are linear property as defined under Section 284(k)(i) of the Act which includes electric power systems. "Electric power systems" are defined as "systems intended for or used in the generation, transmission, distribution or sale of electricity." Section 284(g) of the Act.

18. Under the Municipal Taxation Act these plants would be placed for assessment under the Electric Power and Pipe Line Assessment Act.

19. Both Acts require the evaluation for the assessment to be based on the specification and characteristics of the plants as at October 31 in the year preceding the tax year.

20. Both Acts require that the assessment be prepared by a provincial assessor.

DECISION

In consideration of the above and having regard to the relevant legislation the Board makes the following decision, for the reasons set out below

Both plants are assessable and taxable for the 1995 taxation year.

Both plants should be accorded economic obsolescence in the amount of 20% depreciation. Accordingly the assessments for both plants are reduced as follows:

Raymond Plant, County of Warner	Code 06-0340	15,446,710
Chin Plant, County of Lethbridge	Code 06-0204	5,610,670

REASONS

1. The Board first determined whether or not these plants are assessable for the taxation year 1995. In this regard the Board concluded the following:

    1.1. These plants are not an incidental use to the operation of the irrigation system. The Board arrived at this conclusion by placing the phrase "or any other purpose in connection therewith and incidental thereto" within the four corners of the Irrigation Act . The purpose or genus of this act is to foster irrigation of land. The phrase "incidental thereto" refers to irrigation works - not electricity generating plants. These plants are therefore not exempt under Section 298(c) of the Act..

    1.2. The Board does not accept the argument that these plants are part of a farming operation and should therefore be exempt under Section 298(q) of the Act. The Board finds that the Irrigation Act specifically directs that exempt status should not be conferred on a project simply because it is owned in whole or in part by an irrigation district.

    1.3. The Board finds that there is authority in the Act for the assessment to be prepared and placed on the roll for the taxation year 1995. The Board placed particular weight on Section 292 which directs the assessor to prepare assessment for linear property, and on Section 305(2) of the Act which directs that, if any property is omitted from the roll, a new assessment must be prepared and placed on the roll for the current year.

    1.4. The Board found that the method of preparing the assessment was valid.

    1.5. The Board does not except the argument that the assessment should have been placed under Electric Power and Pipe Line Assessment Act and then would have been found exempt. pursuant to Section 3(1)(b) of that act. It is the opinion of the

Board that the assessment falls under the new Municipal Government Act (the Act) for the taxation year 1995.

1.6. The Board notes that the two acts cited most frequently at the hearing both contain clauses specifically excluding electric power production facilities from the exemptions granted otherwise. For example, Section 298(e)(ii) of the Act exempts from assessment a group of facilities such as headworks, flumes, penstocks, and others but not if these are used "for the generation of electric power".

1.7. Similarly the Electric Power and Pipe Line Assessment Act Section 4(c) and (d) exempt from assessment flood gates, flumes, penstocks, and other facilities except for "any portion of them used for the generation or production electric power".

1.8. This gives credence to the contention by the respondent that the intent of the Legislature is generally not to exempt power production facilities from assessment and taxation.

2. The Board next addressed the issue whether or not there is economic obsolescence inherent in these plants, and if so, how much depreciation should be awarded.

2.1. The Board heard testimony from both the appellant and the respondent that economic obsolescence is or could be present.

2.2. To determine the amount the Board considered what a prudent, knowledgeable buyer would pay to purchase these plants on October 31, 1994.

2.3. Such a buyer would have found two operating plants generating 83.7 MW of electricity in the first year of operation. One of the plants had a short period of downtime due to startup problems.

2.4. He probably would have given most weight to the estimate of projected generating capacity prepared by an independent engineering firm for a third party.

2.5. He would have found it difficult to estimate the operating cost, but based on some reasonable research he may have concluded that the cost would fall halfway between the amounts provided in the two appraisals submitted to the Board.

2.6. The purchaser would have noted that these plants only operate for a limited time each year.

2.7. The prudent purchaser would have noted that there is a guaranteed purchaser for the product for ten years at a rate that would be adjusted for inflation. This would encourage him to use the lower (12.5%) of the two capitalization rates presented by the appraisals provided at these hearings. However, there would be the uncertainty of the operating cost and the short track record of these plants. Consequently he would select the higher (13%) rate to account for these factors.

2.8. The Board based the 20% depreciation for economic obsolescence on the factors described in paragraphs 2.3 to 2.6 above.

3. The Board notes that this decision establishes the assessment value for the taxation year 1995 only. Experience with these plants over a longer term could signal the need for a higher or lower depreciation rate.

It is ordered.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 28th day of November, 1996.

MUNICIPAL GOVERNMENT BOARD

P. VanBelle, Presiding Officer

APPENDIX "A"

APPEARANCES

NAME	CAPACITY
Mr. T. MacLachlan	Solicitor for the Appellant
Mr. J Brown	Manager St. Mary River Irrigation District
Mr. O Hart	President, Small Power Producers Association
Mr. G. Zobell	Manager Raymond Irrigation District
Mr. M. Gilleski	Administrator, Lethbridge Regional Hospital District
Mr. R. Gagne	President AEC Valuations (western) Inc.
Mr. L. Burgess	Solicitor for the Respondents
Mr. W. Kipp	Bryce Kipp Nelson Ltd.
Mr. H. Schmidt	Assessor Alberta Municipal Affairs
Mr. A Romeril	Administrator County of Warner
Mr. M. Dahl	Reeve County of Warner
Mr. D. Driscoll	Assessor Alberta Municipal Affairs

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE BOARD

NO	ITEM
1.	Written brief of the appellant dated November 8 1995
2.	Income Approach to Value, Report prepared by AEC Valuations (Western) Inc. dated November 27,1995
3.	Written brief of the respondents undated
4.	Supplemental written brief of the Respondents undated
5.	Self-Contained Appraisal Report, Prepared by Bryce Kipp Nelson Ltd. Dated April 26, 1996
6.	Organization chart for the Board of Directors of Irrigation Districts and Irrican undated
7.	Production figures fro the years 1994 and 1995 for the Raymond Plant and Chin Plant, undated
8.	Extracts from the predesign reports for both plants dated October 1989

9.	Qualification of Mr. Kipp undated
10.	Recalculation of Net Present Value prepared by Mr. Kipp at the hearing
11.	Assessment Notice for the Raymond Plant dated March 17 1995 and calculations in preparing the assessment.
12.	Assessment Notice for the Chin Plant dated March 17 and calculations in preparing the assessment
13.	Ministerial Order designating March 31,1995 as the date by which municipalities must enter linear assessment on the assessment roll. dated March 2, 1995
14.	Extracts from the Irrigation Act and the Small Power Research and Development Act and restated obsolescence analysis prepared by Mr. Gagne during the hearing.
15.	Western Weekly Reports of three assessment cases before the British Colombia Supreme Court
16.	Extract of the Interpretation Act RSA 1980
17.	Report of the judicial Decision by the Court of Queen's Bench on the Shell Canada Decision, Delivered on the 26 0f June, 1991