

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE EFFECTS OF THE TAX REFORM ACT)
OF 1986 ON CONTRIBUTIONS IN AID OF) ADMINISTRATIVE
CONSTRUCTION AND CUSTOMER ADVANCES) CASE NO. 313

INTERIM ORDER

INTRODUCTION

On August 12, 1987, the Kentucky Public Service Commission ("Commission") issued an Order establishing this proceeding for the purpose of investigating the effects of Section 824 of the Tax Reform Act on the corporate regulated utilities in the Commonwealth of Kentucky and the manner in which this section of the Tax Reform Act is to be handled by these utilities. Under this section, customer contributions in aid of construction ("CIAC") and customer advances received by a corporate regulated utility after December 31, 1986, are to be included as taxable gross income.

The Order required all corporate regulated utilities affected by this law to file testimony describing the effects of this section of the Tax Reform Act on their operations and to respond to questions designed to aid the Commission in judging the magnitude of these effects. Among the issues the utilities were asked to respond to were the following rate-making options for the treatment of CIAC and customer advances:

a. Requiring the contributor to increase ("gross-up") the amount of the contribution to include the associated tax liability.

b. Requiring the utility to bear the tax liability associated with the contribution and passing the increase to on-going customer rates ("no gross-up").

c. Requiring the utility to pay the tax associated with the contribution and splitting any resulting revenue requirements between the on-going customer rates and the contributor.

d. A leasing agreement between the utility and the outside party rather than a contribution transaction.

e. Recording the contribution at its net present value and basing the tax liability on this value.

f. Treating the contribution as deferred revenue and basing the current tax liability on that portion of the contribution treated as current revenue.

g. Any other method under consideration. Among the proposals received under this category was one which would require the contribution be grossed up, but offset by the net present value of future tax benefits that will result from the contribution ("modified gross-up").

In addition to the utilities, the Commission invited other interested parties to file testimony or comments. Motions to intervene in this proceeding were received from the Attorney General of the Commonwealth of Kentucky ("AG") and Brown Sprinkler Corporation ("Brown"). Both of these motions were granted by the Commission. Other interested parties filing comments were the Transportation Cabinet of the Commonwealth of Kentucky ("Transportation") and the Home Builders Association of Kentucky ("HBAK").

The utilities filing testimony and/or comments in this proceeding were Delta Natural Gas Company ("Delta"), American Telephone and Telegraph ("AT&T"), GTE South, Inc. ("GTE"), Clearwater Disposal, Inc. ("Clearwater"), Western Kentucky Gas Company ("Western"), Union Light, Heat and Power Company ("ULH&P"), Columbia Gas of Kentucky, Inc. ("Columbia"), Louisville Gas and Electric Company ("LG&E"), Kentucky Utilities Company ("KU"), Kentucky-American Water Company ("Kentucky-American"), Kentucky Power Company ("KPC"), Contel of Kentucky, Inc. ("Contel"), South Central Bell Telephone Company ("SCB"), and Roy Potter Water Service ("Potter").

In their responses, AT&T, GTE, SCB, Clearwater, and Potter stated that this proceeding was not applicable to their operations. Contel simply stated that it did not wish to offer testimony.

All other responding utilities addressed the items proposed by the Commission in its August 12, 1987, Order, thereby becoming active participants in this proceeding.

On October 12, 1987, the Commission ordered KU, LG&E, KPC, ULH&P, Western, Delta, Columbia, and Kentucky-American to file subsequent comments pertaining to the appropriate journal entries to the various rate-making options detailed above and in the August 12, 1987, Order. All utilities, so ordered, filed comments without exception.

On October 13, 1987, the Commission issued an Order scheduling a hearing for November 10, 1987. The purpose of the hearing was to consider the testimony, comments, and other

evidence presented by the participants in this proceeding. The parties represented and participating at the hearing were the AG, Kentucky-American, Columbia, KPC, LG&E, KU, Western, ULH&P, SCB, Brown, HBAK, and Transportation.

On November 11, 1987, the Commission issued an Order establishing a procedural schedule. This schedule called for parties to file briefs no later than November 30, 1987. The Commission granted Motions for Extensions of Time to File Briefs to the AG and Brown. Briefs were filed in this proceeding by ULH&P, KPC, KU, Kentucky-American, AG, and Brown.

On January 29, 1988, the Commission amended its procedural schedule. On February 26, 1988, a draft Order was issued detailing the proposed methodology to be used by the corporate regulated utilities under the Commission's jurisdiction and requesting comments from all interested parties participating in this procedure.

Those interested parties filing either comments or general acceptance were: Delta, KPC, KU, AG, Brown, Columbia, Western, ULH&P, LG&E, HBAK, and Contel.

It has come to the Commission's attention that HBAK has failed to request intervenor status in this proceeding. However, the Commission grants HBAK intervenor status as if so requested.

All interested parties filing comments regarding the draft Order agreed with the "no gross-up" methodology prescribed by the Commission for all corporate regulated utilities with the exception of Class B and C water and sewer utilities. However, Columbia proposed language revisions to the draft Order regarding

the clarification of the rate base treatment of deferred taxes associated with the "no gross-up" methodology. Having reviewed Columbia's language revisions, the Commission is of the opinion that they are correct.¹

Based on the comments received regarding the draft Order and the overall acceptance of the "no gross-up" method, the Commission is of the opinion that the draft Order should be amended to reflect the language revisions proposed by Columbia and should be affirmed with the exception of the refunding issue. Due to the comments and evidence presented by the AG, Brown, and HBAK, the Commission has amended the section entitled Retroactive Refunds to request further information, and is of the opinion that this issue should be investigated further. This Interim Order approves all findings of the original draft Order with the exception of the retroactive refunding of the taxes collected under the "gross-up" method.

INTERNAL REVENUE SERVICE NOTICE 87-82

On December 21, 1987, the Internal Revenue Service ("IRS") issued Notice 87-82 (published in IRB No. 1987-51) which provided clarifications concerning the Tax Reform Act and CIAC.

This Notice stated that generally relocation payments made by a third party as the result of activities of that party for the removal and/or relocation of existing plant would continue to be treated as non-taxable contributions to capital under IRC Section

¹ The language revisions are on pages 7 and 10, and are underlined.

118(a) where the transfer was made for the benefit of the public as a whole. Examples cited as these types of relocation payments were: the relocation of distribution lines for the expansion of a public highway, or where a mining operation required the removal of existing gas distribution lines.

The notice also contained information concerning the valuation of CIAC received by a utility. Generally the valuation will be the amount of cash received or the fair market value of the property received which was defined as the utility's replacement cost. The notice further stated that should the fair market value of property purchased by the utility be less than the purchase price paid by the utility, then the difference should be recorded as taxable CIAC.

The notice provided that any transaction or arrangement whereby the utility obtains the benefits and obligations of ownership, even though it does not possess legal title to the property, will be considered taxable CIAC to the utility. It also contained explanations of various normalization and accounting treatments to be used by the utilities on affected CIAC.²

The Commission believes that this notice will reduce the concerns of government entities' transactions with utilities and, therefore, satisfies those concerns.

² This information was obtained from the "Public Utility Executive Briefs", 88-1, January 15, 1988. Published by DeLoitte, Haskins and Sells. Individual cites have not been made.

GENERAL DISCUSSION AND FINDINGS

After considering the evidence of record and IRS Notice 87-82, the Commission is of the opinion that there are currently four viable methodologies concerning CIAC which still warrant consideration. The following is a brief synopsis of each methodology:

Gross-up: Under this method the contributor would be required to pay the tax liability associated with the contribution. The contribution would be inflated or "grossed-up" to include the taxes. Under this scenario the tax liability is significantly increased due to the payment of taxes on taxes. This method assumes the contributor is the cost-causer and should bear the additional tax liability.

Modified Gross-up: This is identical to the normal "gross-up" method with the exception that the net present value of tax depreciation expense to be realized by the utility relating to the construction would be used to offset the required contribution. This method assigns the benefit of future tax depreciation to the contributor.

No Gross-up: The tax associated with the contribution would be paid by the utility rather than the contributor. This eliminates the increased tax liability caused by the payment of taxes on taxes. This method assumes that the customers would receive a benefit from construction and, therefore, the carrying cost of the tax liability should be spread over the entire customer base by increasing rate base for deferred taxes on CIAC.

The Kentucky-American Plan: This plan is a hybrid of the "gross-up"/"no gross-up" methodologies where the contributor can select a refund or no refund option.

- a. "No Refund" Option: Under this alternative the contributor would not be required to pay the associated tax liability ("no gross-up"). The total amount contributed would be recorded as ordinary income for tax purposes and the associated tax liability would be recorded as a payable. Kentucky-American would supply the capital necessary for completion of the construction (construction cost - net contributions). The contribution would be recorded as CIAC and the

developer would not be entitled to any potential refund.

- b. "Refund" Option: Under this alternative the contribution would be increased to include the additional tax liability ("gross-up"). The contribution would be recorded as a customer advance and the contributor would be entitled to any potential refunds of the entire contribution within the statutory time limit of 10 years.

In determining what action to take in this proceeding the Commission considered the various advantages and disadvantages of each method in relation to the others.

It was generally agreed that the Tax Reform Act did not create an additional tax liability since ". . . any additional tax liability created on the front end through contribution or advances will be offset over time either through depreciation of the asset or through deductions for the refund of advances . . . Rather, the issue is how to treat the carrying charges associated with the deferred tax balances created by these timing differences".³

Deferred taxes arise when there is a difference between tax accounting and book or rate-making accounting. As previously stated, the Tax Reform Act requires CIAC and customer advances to be treated as taxable income to the receiving utility for income tax purposes. The contributed property can then be depreciated for tax purposes over a predetermined tax life. However, for rate-making purposes, the contribution is not included in the taxable income of the utility, depreciation expense on the

³ Brief of Kentucky Power Company, filed November 30, 1987, page 3.

contributed property is disallowed from the operating expense of the utility, and the property is excluded from the utility's net investment rate base. This difference between tax accounting and rate-making accounting is gradually reduced over a period of time as the contributed property is depreciated for tax purposes and the associated deferred taxes are amortized. The differences in tax accounting and accounting for rate-making equal in the end and, thus, the only issue remaining is the time value of money, or the carrying charge.

Most utilities participating in this proceeding stated a preference for full flexibility among options on a case-by-case basis to decide this issue. However, Brown Sprinkler, in its brief, pointed out that allowing the utilities the option of choosing a method or methods which they preferred could result in a "patchwork pattern of assessments or charges for the taxes and handling costs resulting in confusion . . . would pose a potential financial hazard for small businesses engaged in the construction and construction related trades at sites throughout the state . . . (and) may have an adverse impact on the economic development of some parts of Kentucky while benefiting other areas . . . "4 The Commission agrees with this assessment.

When expressing a preference for one method over another, the utilities (with the exception of ULH&P and Kentucky-American), AG, and Brown Sprinkler chose the "no gross-up" method. This method

⁴ Brief of Brown Sprinkler, filed December 23, 1987, pages 1 and 2.

eliminates the necessity of financing the applicable income taxes with additional collections from the contributor. The tax could easily be paid from the internally-generated cash flow of larger utilities without necessitating additional external financing and the carrying cost could be spread among the general body of ratepayers by allowing deferred taxes on CIAC as an increase to rate base, with a diminutive effect on an individual ratepayer's monthly bill.

In its brief, Kentucky Power Company stated that using 1986 data "the company would have initially paid \$328,000 in state and federal tax associated with contributions and advances, and the customer would have paid the carrying cost through an additional revenue requirement of \$114,000. This would equate to .002¢ per kilowatt hour . . . (a) 24¢/year annual increase in the average customer's bill . . . "5

Conversely, if the burden of the tax is placed entirely upon the contributor, usually a new or expanding business, a developer, or a builder, the impact, and, thus, the potential consequences, becomes quite significant. Based upon a 34 percent federal tax rate, full "gross-up" would require the collection of 51.5 percent more than the amount necessary prior to the Tax Reform Act. A \$100,000 project then becomes a \$151,515 project with no added benefits to either the developer, the utility, or its customers.

⁵ Brief of Kentucky Power Company, filed November 30, 1987, pages 3 and 4.

As a consequence, business expansion, home building, and development could be hampered.

Also notable in this regard is that areas served by municipal or non-profit utilities would gain an advantage in attracting business expansion and development if taxable utilities were required to "gross-up" contributions. The "gross-up" method recognizes the tax liability associated with the contribution or development; however, it does not take into consideration the additional growth in the number of ratepayers a company realizes as a result of development.

Also, because of the intricacies and difficulty in tracing the timing and sources of taxes, the AG in its brief pointed out that the adoption of a "gross-up" method entails ". . . dealing with an estimate, the estimate of what the utility must collect beforehand from the contributor to make itself whole . . . Without knowing what will be taxed and what the tax rate will be, the estimate of what needs to be collected from the contributor is no more than a guesstimate."⁶

The "gross-up" and "modified gross-up" methods are administratively more burdensome. As a utility realizes a reduction in its tax liability, as a result of tax depreciation on the contributed asset, equity and fairness would require that refunds be made to the contributor whose contribution generated the tax depreciation benefit. The attendant record keeping requirements to track the depreciation refunds would be extensive and, there-

⁶ Brief of the AG, filed December 7, 1987, pages 3 and 4.

fore, administratively burdensome for gas, electric, and telephone utilities where CIAC is minimal in relation to plant in service.

The "modified gross-up" method would also require the selection of an interest rate to determine the net present value of tax depreciation expense. In large companies, with a revenue requirement based on a net investment rate base, the allowed rate of return could be used as this interest rate, or with companies that do not utilize a rate base the overall cost of capital might be an acceptable alternative. However, as either of these rates vary, the company would have to keep additional records to refund applicable customer advances to the contributor. This would certainly add to the administrative burden. Further, there is no guarantee that either of these rates is entirely appropriate to this application. Indeed any interest rate used would carry a corresponding element of uncertainty.

A final consideration is the overall federal income tax burden placed upon private and corporate citizens of Kentucky under the various options. Due to the "tax on tax" element of the "gross-up" and "modified gross-up" methods, an additional tax liability is created since the amount collected from the contributor to pay the tax is also considered taxable income by the IRS. Under the "no gross-up" method, a utility's total federal tax liability is generally less than if the "gross-up" or "modified gross-up" methods are used.

GAS, ELECTRIC AND TELEPHONE COMPANIES

Since the "no gross-up" method has a de minimis effect on the revenue requirements of the gas, electric and telephone utilities,

is easy to administer, does not discourage additional growth, does not place one service area or section of the state at a competitive disadvantage, does not increase the total tax liability of a utility as much as the other options, and since the potential increase in tax is the result of temporary, reversible timing differences, the Commission is of the opinion that this method should be employed by the gas, electric, and telephone utilities.

LARGE WATER AND SEWER COMPANIES

The greatest and probably the only difference in CIAC and customer advances for a water or sewer company as opposed to the other types of utility companies is materiality. Generally, for gas, electric, and telephone companies, CIAC and customer advances account for approximately 2 percent of the utility plant in service while Kentucky-American estimated that it comprised nearly 20 percent of its plant in service. Clearly, the impact or potential impact on water companies can be significantly greater than on other companies. Therefore, the Commission is of the opinion that in regard to water companies the primary factors to be considered are the materiality of the contributions to a company, that company's ability to absorb any additional corresponding tax liability that may occur as a result of the contribution, and its impact on the company's customers.

For Kentucky-American, based on the estimated cost of taxable projects for 1988 of \$1,937,000 (a figure supplied by Kentucky-American), a maximum federal tax rate of 34 percent, and the rate of return requested in Case No. 10069, Notice of Adjustment of

Rates of Kentucky-American Water Company, filed December 1, 1987, of 11.09 percent⁷, the "no gross-up" method would result in an additional revenue requirement of \$119,480.⁸ Under the method proposed by Kentucky-American and utilizing their assumptions as put forth in their prefiled testimony (with the exception that an allowance for additional state taxes has been eliminated), there would be an increased revenue requirement of \$47,792⁹ and would require an additional contribution of \$598,707.¹⁰ Under the "no gross-up" method there would be no increase in the contribution required.

Under Kentucky-American's plan, the required company contribution would be \$263,432, under the "no gross-up" method it would be \$658,580. The additional company contribution required under the "no gross-up" method of \$395,148 should not pose any undue burden on Kentucky-American. As evidenced by Kentucky-American's witness, Mr. Ferrel, who stated at the hearing that

⁷ Testimony of Charles F. Phillips, Jr., page 17.

⁸ $\$1,937,000$ (Estimated Project Cost) \times 34% (Federal Tax Rate) = $\$658,580$ \times 11.09% (Requested Rate of Return) = $\$73,036.52$ \times 1.63589482 (Conversion Factor) = $\$119,480$.

⁹ $\$1,937,000$ (Estimated Project Cost) \times 40% (Estimated No Refunds) = $\$774,800$ \times 34% (Federal Tax Rate) = $\$263,432$ \times 11.09% (Requested Rate of Return) = $\$29,214.60$ \times 1.63589482 (Conversion Factor) = $\$47,792$.

¹⁰ $\$1,937,000$ (Estimated Project Cost) \times 60% (Estimated Refunds) = $\$1,162,200$ \times 1.51515 (Federal Tax Gross-up Factor) = $\$1,760,907$ - $\$1,162,200$ = $\$598,707$.

should a "no gross-up" method be used, any additional funds necessary would not create a problem for the company.¹¹

Based on Kentucky-American's total customer base of 71,500¹² (including residential, commercial, industrial, etc.), Kentucky-American's proposal would require an additional estimated revenue requirement of 67¢ per year per customer. The "no gross-up" method would require an estimated \$1.67 per year per customer. This annual \$1 difference should not constitute any undue burden on Kentucky-American's customers.

Under the "gross-up" method no additional revenue requirement would be necessary nor would any company contribution be required of Kentucky-American. However, the estimated cost of taxable projects would increase from \$1,937,000 to \$2,934,846, nearly a \$1 million increase without \$1 of additional services being provided by the increase. (This would be true to a smaller extent for any utility under the "gross-up" method).

While no additional revenue requirements would be necessary, the additional cost would have a negative impact on Kentucky-American's and the Commission's joint goal of Kentucky-American becoming a regional supplier of water. The impact of the "gross-up" method on this goal can be demonstrated by the experience of Kentucky-American in Scott County where some potential customers claimed that their wells had been polluted by a landfill. The

¹¹ Transcript of Evidence, filed November 20, 1987, page 59.

¹² December 1987 Monthly Report of Kentucky-American Water Company filed February 1, 1988.

city and county governments involved were willing to pay the expansion costs to Kentucky-American's facilities but refused to pay any additional tax increment. The situation was resolved only by assuming the contribution would not be considered taxable income to Kentucky-American.¹³

Since the "no gross-up" method would not place any undue burden on Kentucky-American or its ratepayers, and for the other reasons stated previously, the Commission is of the opinion that Kentucky-American and all Class A and B water and sewer companies should use this method in its tax treatment of CIAC and customer advances. However, quarterly reports should be filed by these companies with the Commission in sufficient detail to enable the Commission to take appropriate action should this method become burdensome to these companies or their ratepayers in the future.

SMALL WATER AND SEWER COMPANIES

No small water or sewer companies participated in this proceeding. However, the taxation of CIAC and customer advances should be an issue of major concern to these companies. All the major companies participating in this proceeding agreed that the financing of any additional tax on CIAC and customer advances would not present a financial hardship to them. This payment may present a financial hardship to small companies. The New York Public Service Commission recognized this difficulty when in Case No. 29465 it stated:

¹³ Brief of Kentucky-American Water Company filed November 30, 1987, page 3-4.

The companies are often financially weak, have uncertain tax situations, and have limited administrative capacity to account for the tax consequences of contributions.¹⁴

The Commission agrees with this finding. Small companies under its jurisdiction have often experienced difficulty in obtaining loans from private sources. The reason most often given for this inability is the usually poor financial condition of these companies, primarily, due to the small customer base from which operating revenues can be derived.

Since the payment of any additional tax liability incurred as the result of CIAC and customer advances could pose a severe financial hardship on small water and sewer companies, the Commission directs Class C utilities to use the "gross-up" method. The tax increments collected from these contributions should be placed in an interest bearing account with the difference between actual tax liability and the amount collected being refunded to the individual contributors with interest.

As stated above by the New York Commission, small water and sewer companies have an uncertain tax situation. The contributions, depending on the amounts received when considered with the other variables involved in determining actual tax liability, may have little or no impact on these companies actual tax liability. Therefore, should future operations indicate that the

¹⁴ Proceeding on Motion of the Commission as to the Proposed Accounting and Rate-making Procedures to Implement Requirements of the Tax Reform Act of 1986 as they Effect Public Utilities, Order issued July 7, 1987.

"no gross-up" method would not cause severe hardship on these small companies or their customers, this method should also be adopted by these companies.

ACCOUNTING TREATMENT

In accounting for the collections and the resulting tax liability, deferred tax accounting should be practiced in accordance with General Instruction 18, Comprehensive Interperiod Income Tax Allocation, of the Uniform System of Accounts. Adequate records of collections, tax liabilities, depreciation, and deferred tax balances should be kept in such order that these amounts can readily be supplied to the Commission upon request.

REFUNDS ON CUSTOMER ADVANCES

As is the case now, the Commission is of the opinion that refunds on those amounts classified as customer advances for construction should be continued. Refunds are returned as new customers are added to the property financed by customer advances.

OTHER CONSIDERATIONS

Deviations

Though specific methods to be followed by jurisdictional utilities when collecting CIAC and customer advances are prescribed herein, the Commission recognizes that certain circumstances may necessitate deviations to those prescribed methods. Therefore, the Commission, upon proper notification and sufficient justification, will permit deviations if warranted on a case-by-case basis.

Retroactive Refunds

The AG, in its brief, requested that the tax contributions that have been collected thus far under the "gross-up" method be refunded if another method is prescribed. Originally, the Commission was of the opinion that it would be improper to compel the utilities to refund these taxes since the utilities were operating under the method prescribed by the Commission in previous tax proceeding Orders which required the use of the "gross-up" method. However, the AG, Brown, and HBAK requested that the Commission reconsider the issue of refunding the income taxes collected under the "gross-up" method. HBAK presented compelling evidence as to the significant effect the "gross-up" method had on the contributors as compared to the utilities.

Based on the comments received, the Commission requests that the following information along with any other evidence that the respondent deems appropriate be filed:

- a. The net amount of CIAC and customer advances collected under the "gross-up" method.
- b. Total taxes collected under the "gross-up" method separated into state and federal.
- c. Projected rate base and revenue effects if the taxes were required to be refunded.
- d. Any adverse effects that the utility might expect to occur due to the requirement of refunds.
- e. Any difficulties that the utility might expect to occur such as determining the amounts and who is entitled to refunds.

SUMMARY

The Commission, after consideration of the evidence of record and being advised, is of the opinion and finds that:

1. Taxable electric, gas, and telephone utilities should use the "no gross-up" methodology for CIAC and customer advances collected on and after the date of this Order.

2. Taxable Class A and B water and sewer utilities should use the "no gross-up" methodology for CIAC and customer advances collected on and after the date of this Order.

3. Taxable Class C water and sewer utilities should use the "gross-up" methodology for CIAC and customer advances collected on and after the date of this Order.

4. If the tax collected under the "gross-up" method is greater than the actual tax liability associated with the CIAC or customer advance at year's end, then the utility should refund back to the contributor the excess amounts collected with interest.

5. The interest rate should be the same rate as that which is prescribed for customer deposits.

6. Taxable Class A & B water and sewer utilities should file quarterly reports with this Commission in such detail as to enable the Commission to determine the impact of the "no gross-up" method on the utility and its customers.

7. In accounting for the collections and the resulting tax liability, deferred tax accounting should be practiced in accordance with the Uniform System of Accounts prescribed for that particular utility. Adequate records of collection, tax

liabilities, depreciation, and deferred tax balances should be kept such that these amounts can readily be supplied to the Commission upon request.

8. Refunds on customer advances for construction are appropriate and should be continued.

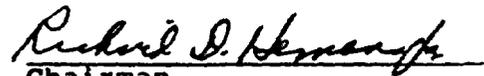
9. The draft Order of February 26, 1988, as amended herein, should be affirmed, with the exception of the issue of refunding taxes collected under the "gross-up" method. This issue should be further investigated.

10. All interested parties desiring to file evidence concerning the issue of refunding the taxes collected under the "gross-up" method as requested in the section on retroactive refunds should do so by May 6, 1988. Parties should file 11 copies of the information with the Commission and serve a copy on each party listed on the service list.

BE IT SO ORDERED.

Done at Frankfort, Kentucky, this 15th day of April, 1988.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Executive Director