



AltaGas Utilities Inc.

**Decision on Request for Review and Variance of
AUC Decision 2013-071**

June 13, 2013

The Alberta Utilities Commission

Decision 2013-224: AltaGas Utilities Inc.

Decision on Request for Review and

Variance of Decision 2013-071

Application No. 1609566

Proceeding ID No. 2585

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1 Introduction

1. On May 3, 2013, the Alberta Utilities Commission (AUC or Commission) received an application from AltaGas Utilities Inc. (AltaGas) for review and variance of an earlier Commission review and variance resulting in Decision 2013-071.¹ Decision 2013-071 addressed an earlier Commission decision on performance-based regulation (PBR) for five distribution utilities, Decision 2012-237 (the PBR decision).² For the purposes of this decision, the review and variance proceeding leading to Decision 2013-071 will be called the “first review and variance” and the proceeding for this application will be called the “second review and variance.”

2. AltaGas’s second review and variance application requested a review and variance of Decision 2013-071, and effectively a review of the PBR decision. AltaGas stated that the application was made on the basis that the Commission failed to correct errors which were the subject matter of Decision 2013-071, failed to correct errors in the PBR decision in Decision 2013-071 and that one Commission member (the Vice-Chair) sitting on both the original proceeding and the first review and variance constituted a reasonable apprehension of bias.

3. The grounds contained in AltaGas’s second review and variance application related to the following two issues determined in the PBR decision, which were the subject of the first review and variance decision: the denial of deferral account treatment for AltaGas’s internal hearing costs and the denial of an adjustment for pension expenses. AltaGas submitted in paragraph 28 of its current application that the Commission denied it “a reasonable opportunity to recover its prudently incurred costs and earn a return on and of its investment required to meet the obligations and responsibilities prescribed under the *Gas Utilities Act* and the *Roles, Relationships and Responsibilities Regulation*, enacted thereunder.”

4. The Commission assigned Mr. Tudor Beattie, QC, Commission member, referred to in this decision as the review Commission member, to make a decision on AltaGas’s second review and variance application.

2 Background

5. On September 12, 2012, the Commission issued the PBR decision approving PBR plans for each of the distribution companies for a five year term commencing January 1, 2013. The

¹ Decision 2013-071: Rate Regulation Initiative, Distribution Performance-Based Regulation, Decision on Preliminary Question, Requests for Review and Variance of AUC Decision 2012-237, Application Nos. 1609018, 1609019, 1609024, 1609025, and 1609097, Proceeding ID No. 2240, March 4, 2013.

² Decision 2012-237: Rate Regulation Initiative, Distribution Performance-Based Regulation, Application No. 1606029, Proceeding ID No. 566, September 12, 2012.

hearing panel was comprised of: Willie Grieve (Chair), Mark Kolesar (Vice-Chair), and Moin Yahya (Commission Member). PBR replaces traditional cost-of-service regulation as the annual rate-setting mechanism for utility rates. The PBR framework provides a formula mechanism for the annual adjustment of rates independent of the underlying costs incurred by the companies. In general, the companies' rates are adjusted annually by means of an indexing mechanism that tracks the rate of inflation relevant to the prices of inputs the companies use less an offset to reflect the productivity improvements the companies can be expected to achieve during the PBR plan period. As a result, a utility's revenues are no longer linked to its costs. Companies subject to a PBR regime must manage their businesses and service obligations with the revenues derived under the PBR formula. The PBR framework is intended to create efficiency incentives similar to those in competitive markets.

6. There are certain adjustments that distribution companies can apply for treatment outside the indexing mechanism to recognize unforeseen events that are outside the ability of the regulated entity to control, to recover costs for certain specific capital projects, and to allow for rate adjustments for flow through to customers of third party charges that are beyond the control of companies, deferral accounts, or accounts that would require flow-through treatment. In the PBR decision, the Commission set out criteria for when these items will be treated as an adjustment outside the indexing mechanism. If the criteria are met, a company will be permitted to recover the costs associated with these items outside the indexing mechanism on a cost of service basis.

7. In Decision 2013-071 the Commission denied a review and variance of the PBR decision at the preliminary question stage for the five PBR companies. The review panel was composed of: Mark Kolesar (Vice-Chair), Neil Jamieson (Commission Member), and Henry van Egteren (Commission Member). In its decision, the Commission specifically denied a further review of AltaGas's request for deferral account treatment for AltaGas's internal hearing costs and the denial of an adjustment outside the indexing mechanism for pension expenses.

3 Decision on the second review and variance application

8. The Commission's authority to vary, rescind or confirm its own decisions is found in Section 10 of the *Alberta Utilities Commission Act*, SA 2007, c. A-37.2. Section 10 reads:

10(1) The Commission may in accordance with the rules made under subsection (2) review any decision or order made by it under this Act or any other enactment and after the review may confirm, rescind or vary the decision or order.

(2) The Commission may make rules respecting the review of any decision or order made by it, including

- (a) the criteria that the Commission may use to determine whether to review a decision or order,
- (b) the eligibility of a person to request a review,
- (c) the information that a person requesting a review must provide to the Commission, and
- (d) the time period within which a person may request a review by the Commission.

(3) On receiving an application under this section, the Commission may suspend the decision or order on the terms and conditions the Commission prescribes.

9. Review and variance applications are considered by the Commission under [Rule 016: Review and Variance of Commission Decisions](#) (Rule 016). Section 11 of Rule 016 states:

The Commission shall decide, with or without a hearing, the preliminary question of whether the decision made by it should be reviewed as requested in the application for review.

10. In response to the first review and variance application, and as set out in Rule 016, the Commission adopted a two-step process: first, the Commission determines the preliminary question as to whether the decision in question should be reviewed; and second, if the Commission grants an application for review, a hearing on the merits is held.

11. The Commission rejected AltaGas's application for a review and variance in Decision 2013-071. Decision 2013-071 sets out the reasons in paragraphs 102 to 107 and paragraphs 125 to 127 as to why, at the preliminary question stage of the process, the Commission decided that it would not grant AltaGas's request for a review and variance of the denial of recovery of internal hearing costs and an adjustment for pension expenses. In making its decision, the Commission considered the submissions in AltaGas's initial application for review and variance, dated November 13, 2012, supplemental submissions filed on December 5, 2012, reply comments filed on January 17, 2013, as well as the comments provided by other parties to the proceeding.

12. The Commission finds that grounds included in AltaGas's second review and variance application were already raised, considered and addressed in Decision 2013-071. The Commission finds that the grounds in AltaGas's second application for review and variance are substantially the same as those included in the earlier proceeding (Proceeding ID No. 2240) and include essentially the same information, which the Commission reviewed and rejected in Decision 2013-071.

13. The Commission is similarly not persuaded by AltaGas's submissions at paragraphs 16, 22 and 23 in the second application for review and variance related to the Commission's denial of deferral account treatment for AltaGas's internal hearing costs and the denial of an adjustment for pension expenses, that a failure to correct errors on a review and variance results in further reviewable errors, in itself, constitutes a basis for granting a further review. Mr. Justice O'Brien in discussing the role of a review panel in the Alberta Court of Appeal's reasons for judgment in *AltaGas Utilities Inc. v. Alberta Energy and Utilities Board*,³ (2008) ABCA 46, quoted, with approval in paragraph 39, the Energy and Utility Board's Decision 2000-25⁴ on an application for review and variance:

While the legislation setting out review provisions provides the Board with wide discretion, the case law has established restrictive guidelines for use by tribunals when considering whether to review and vary their decision. The reasons for these guidelines, or criteria, are to ensure and preserve the integrity of decision of a tribunal. A decision of a tribunal should be final, subject to decision or appeal. If a tribunal could review and change its decisions at will, the certainty of the decision of the tribunal would be in jeopardy.

³ 2008 ABCA 46

⁴ Alberta Energy and Utilities Board, Decision 2000-75: Canadian Western Natural Gas Company Limited, Review and Variance of Decisions 2000-9 and 2000-16 by the Federation of Alberta Gas Co-ops Ltd. and Gas Alberta Inc., Application No. 980413, File No. 1900-4/1304-8, December 12, 2000.

14. The Commission considers that certainty of decision making, especially in the context of the present case where the Commission has in a previous decision rejected AltaGas's first review and variance application based on essentially the same grounds included in the second review and variance application is paramount.

15. For the above reasons, the Commission denies the second review and variance relating to the denial of deferral account treatment for AltaGas's internal hearing costs and the denial of an adjustment for pension expenses.

16. In relation to AltaGas's allegation of a reasonable apprehension of bias, it submitted at paragraphs 14 and 27 of its second review and variance application that a Commission member sitting on a review panel of his own decision constitutes a reasonable apprehension of bias. AltaGas argues that this "is a reviewable error warranting a review and variance of the initial R&V application."⁵

17. The established test for reasonable apprehension was originally set out by Justice Grandpré, dissenting, in *Committee for Justice and Liberty v. National Energy Board*,⁶ and was quoted and as the established authority for the test of reasonable apprehension of bias in *Wewaykum Indian Band v. Canada*:⁷

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision – maker], whether consciously or unconsciously, would not decide fairly.

18. In *R. v. S(R.D.)*, the Supreme Court of Canada stated that the test has "a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case."⁸

19. In *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*,⁹ the Court of Appeal of Alberta discussed the case law surrounding the test for reasonable apprehension of bias:

At the end of the day, the issue comes down to whether there is a reasonable apprehension of bias. The test for an apprehension of bias is high. The standard is the reasonable observer, not one with a very sensitive or scrupulous conscience: *Committee for Justice and Liberty* at p. 395. The grounds must be serious, substantial and based on a real likelihood or probability, not mere suspicion: *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176 (CanLII), 2008 ABCA 176 at para. 29, 91 Alta LR (4th) 49, 437 AR 199. Bald assertions of bias are not sufficient: *Ironside v. Alberta (Securities Commission)*, 2009 ABCA 134 (CanLII), 2009 ABCA 134 at para. 103, 11 Alta LR (5th) 27, 454 AR 285. In light of its legislative mandate, there is a strong presumption that the Commission and its panels will properly discharge their duties and are not tainted by bias: *Ironside* at para. 103.¹⁰ (emphasis in original)

⁵ AltaGas application, page 9, paragraph 27.

⁶ 1978 2 S.C.R. 673

⁷ 2003 SCC 45, paragraph 60

⁸ [1997] 3 SCR 484, paragraph 111

⁹ 2012 ABCA 84

¹⁰ *Ibid.*, paragraph 24

20. The Commission is unable to ascertain the nature of AltaGas's allegation of a reasonable apprehension of bias given that the only information provided in AltaGas's application to explain the reasonable apprehension of bias was that a Commission member sitting on a review panel of his own decision constitutes a reasonable apprehension of bias.

21. The relevant case law establishes that the test for a reasonable apprehension of bias is high. Prior case law sets out that there is no rule that any degree of earlier participation is cause for an automatic disqualification, and that an assessment of reasonable apprehension of bias is fact specific.¹¹ The issue of a participation of a tribunal member in both an original proceeding and a review process was recently addressed in *Grey Highlands (Municipality) v. Plateau Wind Inc.*¹² dealing with an appeal from the Ontario Energy Board to the Ontario Superior Court of Justice Divisional Court:

The appellant argued that the participation of a Board member in the review process gave rise to a reasonable apprehension of bias when that member had participated in the original decision. This argument fails to take into account the difference between an appeal and a review or reconsideration. The participation of a member of the original panel ensured that the review panel would have at least one member familiar with the facts of the case to provide context and to determine the impact of alleged factual errors or new facts and circumstances. Given the highly technical nature of matters before the Board, it makes sense that one of the original members would be present on the reconsideration. Therefore, we would not give effect to this ground of appeal.

22. AltaGas's ground that a reasonable apprehension of bias has arisen in the first review and variance has not been supported by the application. The Commission cannot determine the validity of the ground of a reasonable apprehension of bias occurred as a result of the participation of the Vice-Chair on the panel for the first review and variance without information to assess the real likelihood or probability of an apprehension of bias. The Commission does not consider that AltaGas's application establishes that a further review is required on the ground of a reasonable apprehension of bias arises solely from the composition of the review panel. The Commission therefore denies AltaGas's request for a second review and variance on the ground of reasonable apprehension of bias.

23. Under Section 10 of the *Alberta Utilities Commission Act* and Section 11 of Rule 016, the review Commission member dismisses AltaGas's application for a second review and variance of Decision 2013-071.

Dated on June 13, 2013.

The Alberta Utilities Commission

(original signed by)

Tudor Beattie, QC
Commission Member

¹¹ *Wewaykum Indian Band v. Canada*, 2003 SCC 45, paragraph 81; *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*, 2012 ABCA 84 paragraph 29; and *Beaverford v. Thorhild (County No. 7)* 2013 ABCA 6, paragraph 20.

¹² 2012 ONSC 1001, paragraph 9.